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No. 104.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1929.

NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, APPELLANT,

VS.

JOSEPH B. THOMPSON, SUPERINTENDENT OF THE INSURANCE DEPARTMENT OF THE STATE OF MISSOURI, AND STRATTON SHARTEL, ATTORNEY GENERAL OF THE STATE OF MISSOURI, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

BRIEF FOR APPELLEES.

STRATTON SHARTEL,
Attorney General of Missouri,
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FLOYD E. JACOBS,
JOHN T. BARKER,
Counsel for Appellees.

INDEX

Statement 1
Points and Authorities 5
Argument 10
Conclusion 84

CITATIONS

Aetna Ins. Co. vs. Hyde, 315 Mo. 13 . . . . . .2, 4, 9, 25, 35, 77, 81, 82
Aetna Ins. Co. vs. Hyde, 275 U. S. 440 . . . . . 2, 25
Aetna Ins. Co. vs. Travis, 259 Pacific 1068 . . . .4, 7, 60
Aetna Ins. Co. vs. Hyde, 285 S. W. l. c. 70, 71, 72 . . . . . .7, 52, 57
Allen vs. Georgia, 166 U. S. l. c. 140 . . . . . .5, 17
Alejandrino vs. Quezon, et al., 271 U. S. l. c. 535 . .5, 18
Ark. Rate Cases, 187 Fed. 290 . . . . . .7, 56
Baltimore S. S. Co., et al. vs. Phillips, 274 U. S. l. c. 321 . . . . . .8, 71
Banton vs. Belt Line Ry., 268 U. S. 413 . . . . . .5, 23
Bank of the U. S. vs. Bank of Washington, 6 Pet. 8, 8 L. Ed. 299 . . . . . .6, 39
Brownlow, et al., Comrs. vs. Schwartz, 261 U. S. l. c. 217 . . . . . .5, 15
Brown vs. Detroit Trust Co., 193 Fed. l. c. 626 . . . .6, 44
Cummings vs. Mugge, 94 Ill. 186 . . . . . .6, 43
Cedar Rapids Gaslite Co. vs. Cedar Rapids, 144 Iowa 426, 48 L. R. A. (N. S.) 1025 . . . . . .7, 56
Chicago & Grand Trunk Ry. Co. vs. Wellman, 143 U. S. 339, l. c. 345 . . . . . .7, 53
Chicago, Great Western Ry. Co. vs. Kendall, Governor, et al., 266 U. S. l. c. 100 . . . . . .8, 76
City of St. Louis vs. St. Louis Gaslight Co., 70 Mo. l. c. 121 . . . . . .6, 49
Company vs. Lewis, 180 N. Y. Supp. l. c. 586 . . . .7, 56

Consolidated Gas Co. vs. N. Y., 157 Fed. 849 .....7, 56
Company vs. Nixon, 181 N. Y. Supp. 623 .....7, 56
Company vs. Barnes, 189 Fed. 769 .....9, 82
Company vs. Railroad, 77 N. H. 6, 45 L. R. A. (N. S.) 845 .....9, 82
21 C. J. p. 172 .....5, 29
3 Cyc. 462 .....6, 38
10 C. J. 411, 12, 13, 18 .....7, 57
12 C. J. 850 .....9, 82
Darnell vs. Edwards, 244 U. S. 564, 37 Sup. Ct. Rep. 702 .....7, 57
Detroit & M. R. Co. vs. Michigan R. R. Com., et al., 203 Fed. l. c. 871 .....8, 65
Detroit & Mackinac Ry. vs. Mich. R. R. Com., 235 U. S. l. c. 404, 406 .....8, 66
18 Encyc. of Pl. & Pr. 871 .....6, 38
Fullman vs. Steel City Electric Co., 2 Fed. (2d Ed.) 4, l. c. 6 .....6, 33
Fugurul vs. Rivera, 232 U. S. l. c. 374 .....8, 72
10 Fletcher Cyc. Cor. pp. 747, 748 .....7, 57
Galveston Electric Co. vs. Galveston, 258 U. S. 388, 42 Sup. Ct. Rep. l. c. 356 .....7, 56
German Alliance Insurance Co. vs. Lewis, 233 U. S. 389, 34 Sup. Ct. Rep. 612; L. R. A. 1915, 1189 .....9, 80
Groesbeck vs. Duluth, 250 U. S. 607 17
Gott vs. Powell, 41 Mo. l. c. 420 .....6, 38
Haebler vs. Myers (N. Y.), 15 L. R. A. 588 .....6, 41
Hess vs. Deppen, 125 Ky. 425, 15 Am. & Eng. Ann. Cas. 670 .....6, 42
Henderson vs. McWaters, 104 S. C. 268 .....9, 82
In re Freight Rates, 9 I. C. R. 382 .....7, 56
Ill. Cent. R. R. Co. vs. Interstate Commerce Com., 206 U. S. 441, 27 Sup. Ct. Rep. 700 .....7, 56
Insurance Co. of North America, et al. vs. Welch, Ins. Com'r, et al., 49 Okla. 620, 154 Pac. l. c. 50 .....9, 80

Kansas City Southern Ry. Co. vs. U. S., 52 L. R. A. (N. S.) l. c. 51 .....7, 56
Kline vs. Vogel, 90 Mo. l. c. 245, 247 .....6, 36
Langley vs. Devlin, et al., 163 Pac. 395; 4 A. L. R. l. c. 42 .....6, 35
Legg vs. Company, 1 Calif. R. C. R. 11 .....7, 56
Martin vs. Howard, 96 Neb. 278, 147 N. W. 689 ..9, 82
Meccano, Ltd. vs. John Wanamaker, New York, 253 U. S. l. c. 141 .....8, 78
Mo. Rate Cases, 230 U. S. 474, 33 Sup. Ct. Rep. l. c. 979 .....7, 56
Moncrief vs. Palmer, 114 Atl. 181; 17 A. L. R. l. c. 120 .....6, 34
Minn. Rate Cases, 230 U. S. 352, 33 Sup. Ct. Rep. 762 .....7, 56
National Union Fire Insurance Co. vs. Wanberg, 260 U. S. l. c. 73 .....9, 80
Neblett vs. Macfarland, 92 U. S. l. c. 103 .....6, 32
Northwestern Fuel Co. vs. Brock, 139 U. S. 216, 35 L. Ed. 151, l. c. 219 .....6, 40
Pan American Co. vs. U. S., 273 U. S. l. c. 505 ..5, 30
People vs. Company, 126 Ill. App. 636 .....9, 82
Pierce vs. National Bank of Commerce in St. Louis, 268 Fed. l. c. 495 .....8, 74
Puget Sound Electric Ry. vs. Lee, et al., 207 Fed. l. c. 865 .....8, 70
Railroad Co. vs. Brown, 43 Mo. 294 .....6, 39
Railroad Co. vs. Barker, 210 Fed. Rep. 902, l. c. 914 .....6, 44
Re North Adams, 27 Mass. G. & E. L. C. R. 17 ....7, 56
R. S. Mo. 1919, Sec. 6284 2
2 R. C. L. p. 169 .....5, 19
27 R. C. L. p. 82 .....5, 19
1 R. C. L. p. 317 .....5, 19
Smith vs. Apple, 6 Fed. (2d) l. c. 563 .....8, 73
Smythe vs. Ames, 169 U. S. 466, 18 Sup. Ct. Rep. 418 .....7, 56

Southern Railway vs. Com'rs, 196 Fed. 558 .....6, 43
State of Neb. vs. Adams Express Co., 85 Neb. 25, 42 L. R. A. (N. S.) l. c. 401 .....7, 54
State vs. Virginia & T. R. Co., et al., 24 Nev. 53, 49 Pac. 945 .....7, 56
State, ex rel., Hyde, Supt. vs. Westhues, J., 290 S. W. l. c. 448 .....5, 22
State, ex rel., Hyde vs. Westhues, 316 Mo. 457 50
State, ex rel. vs. Public Service Commission, 252 S. W. l. c. 452 .....7, 57
State of Missouri vs. C. B. & Q. R. R. Co., 241 U. S. l. c. 539, 541, 542 .....8, 67
State, ex rel., Waterworth vs. Harty, Superintendent, 278 Mo. l. c. 692 .....9, 81
Talbott vs. Hill, et al., 261 Fed. l. c. 246 .....6, 32
Thomas, Trustee vs. Railroad Co., 109 U. S. l. c. 526 .....5, 31
U. S., ex rel., Norwegian Nitrogen Co. vs. Commission, 274 U. S. 106, l. c. 110, 111 .....5, 15
U. S. vs. Trinidad Coal & Coking Co., 137 U. S. l. c. 171 .....5, 30
Union Pacific R. R. Co. vs. U. S., 99 U. S. 402 ....7, 56
United Fuel Gas Co. vs. Public Service Com. of West Virginia, et al., 278 U. S. l. c. 326 .....8, 77
West Texas Loan Co., et al. vs. Beckham, 201 S. W. l. c. 583 .....5, 29

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

BRIEF FOR APPELLEES.

STATEMENT.

On October 9th, 1922, the Insurance Department of Missouri, after a full hearing, ordered a 10 per cent reduction in fire insurance rates, effective November 15th, 1922 (R. 5). All of the fire insurance companies doing business in Missouri proceeded jointly under Section

6284, Revised Statutes of Missouri, 1919, to have such order reviewed and, after a full hearing, the Supreme Court of Missouri upheld the reduction order. (*Aetna Insurance Company* v. *Hyde,* 315 Mo. 113.) Certiorari proceedings were thereupon instituted in this court and the decision of the Missouri Supreme Court was undisturbed and became final. (*Aetna Insurance Company, et al.* v. *Hyde, et al.,* 275 U. S. 440.)

Thereupon appellant and all other fire insurance companies doing business in Missouri brought individual suits in the District Court seeking again to litigate the questions which had been litigated through the Missouri Supreme Court and on to the Supreme Court of the United States.

A three-judge court was assembled and it denied a temporary injunction to appellant and one hundred and thirteen other companies on three grounds, although the opinion might be said to have finally rested on one ground:

(a) Because appellant and these other companies had stipulated that in case such reduction order through the state courts was upheld, they would refund all excess premiums collected, and appellant had failed to do so (R. 108, 109).

(b) Because the judgment of the Missouri Supreme Court sustaining such reduction order had become final and was *res adjudicata,* and the same experience could not again be litigated (R. 105).

(c) Because the burden of proving confiscation was not met by appellant because it had not fully disclosed its income and outgo (R. 127).

It is true the court held that while appellant had not shown confiscation, it would allow a further proceeding on the theory that appellant might be able to amend its petition. Yet the holding on this point was against appellant and the most casual examination of this petition will disclose that appellant failed entirely to meet the burden of proof and did not disclose fully its income and outgo. The court held the matter regarding the 10 per cent reduction was closed, except perhaps for a consideration of the effect of such reduction as to the future experience or appellant.

The only question therefore before this court is whether or not the refusal of this temporary injunction was arbitrary because great deference will be paid to the finding of the lower court on this point. The record discloses that the temporary injunction was properly refused and that this seven years litigation, in so far as the past experience of these companies is concerned, is at an end.

The decision below, after denying a temporary injunction, passed upon many questions which perhaps will not be reviewed by this court. The position of the State as to the method of figuring profit and loss was sustained. The position of the State that the decision of the Missouri Supreme Court, undisturbed by this court, was final, and that the experience of the past could not again be litigated and that nothing remains to be done except to make restitution, was sustained. The position of the State that appellant was not entitled to a temporary injunction, because of having violated its stipulation and not having made restitution, was sustained.

The court, however, held that in figuring profit and loss interest earnings on unearned premiums should not be included as income. We disagree with this holding, but instead of briefing this matter fully, we invite a reading of the Missouri and Kansas opinions on this point where the State was sustained and the matter is fully discussed. *Aetna Insurance Company* v. *Hyde,* 315 Mo. 13, 285 S. W. 65. *Aetna Insurance Company, et al.* v. *Travis,* 259 Pacific 1068.

The court also held against the State in refusing to exclude over two million dollars excess commissions paid agents in St. Louis, or at least the court indicated it was not satisfied with such exclusion. The opinion of the Missouri Supreme Court is so clear on this point that we adopt it. If this court cares to go into these questions it will find they are fully discussed in these two opinions, and we feel unable to add anything to them.

POINTS AND AUTHORITIES.

I.

Since this appeal was taken, appellant and all other fire insurance companies doing business in Missouri have voluntarily put the 10 per cent reduction in effect. Inasmuch as the suits in the District Court were to prevent such reduction from going into effect, the question is now a moot one, and this appeal should be dismissed.

Banton v. *Belt Line Ry.*, 268 U. S. 413.
U. S. ex rel. Norwegian Nitrogen Co. v. *Commission*, 274 U. S. 106, l. c. 110, 111.
Brownlow, et al., Comrs. v. *Schwartz*, 261 U. S. l. c. 217.
Allen v. *Georgia*, 166 U. S. l. c. 140.
Alejandrino v. *Quezon, et al.*, 271 U. S. l. c. 535.
2 R. C. L. p. 169.
27 R. C. L. p. 82.
1 R. C. L. p. 317.
State ex rel. Hyde, Supt. v. *Westhues, J.*, 290 S. W. l. c. 448.

II.

The three-judge court in this case rightfully held that it would not consider the granting of a temporary injunction until restitution was made of this money wrongfully collected and retained because of a stipulation agreeing to refund same. The maxim of "He who seeks equity must do equity" was properly upheld.

West Texas Loan Co., et al. v. *Beckham*, 201 S. W. l. c. 583.
21 C. J. p. 172.
U. S. v. *Trinidad Coal & Coking Co.*, 137 U. S. l. c. 171.
Pan American Co. v. *U. S.*, 273 U. S. l. c. 505.
Thomas, Trustee, v. *Railroad Co.*, 109 U. S. l. c. 526.

Neblett v. *Macfarland*, 92 U. S. l. c. 103.
Talbott v. *Hill, et al.*, 261 Fed. l. c. 246.
Fullman v. *Steel City Electric Co.*, 2 Fed. (2d Ed.) 4, l. c. 6.
Moncrief v. *Palmer*, 114 Atl. 181; 17 A. L. R. l. c. 120.
Langley v. *Devlin, et al.*, 163 Pac. 395; 4 A. L. R l. c. 42.
Kline v. *Vogel*, 90 Mo. l. c. 245, 247.
3 Cyc. 462.
18 Encyc. of Pl. & Pr. 871.
Gott v. *Powell*, 41 Mo. l. c. 420.
Railroad Co. v. *Brown*, 43 Mo. 294.
Bank of the U. S. v. *Bank of Washington*, 6 Pet. 8, 8 L. Ed. 299.
Northwestern Fuel Co. v. *Brock*, 139 U. S. 216. 35 L. Ed. 151, l. c. 219.
Haebler v. *Myers* (N. Y.), 15 L. R. A. 588.
Hess v. *Deppen*, 125 Ky. 425, 15 Am. & Eng. Ann. Cas. 670.
Cummings v. *Mugge*, 94 Ill. 186.
Southern Railway v. *Com'rs*, 196 Fed. 558.
Brown v. *Detroit Trust Co.*, 193 Fed. l. c. 626.
Railroad Co. v. *Barker*, 210 Fed. Rep. 902, l. c. 914.
City of St. Louis v. *St. Louis Gaslight Co.*, 70 Mo. l. c. 121.

III.

The District Court held that all of the petitions for temporary injunction should be dismissed because of the failure to fully disclose the experience of the companies. They submitted their experience on an erroneous and improper basis. The court, after condemning such method and stating that it could very well deny an application for a temporary injunction for such reason, refused to do so on the theory that such petitions could be amended. Obviously, these petitions do not state any cause of action and no equity is contained in any of them. They failed

to inform the court as to the full amount of their income and outgo. One complaining about a confiscatory rate must make full disclosure of its entire business.

Chicago & Grand Trunk Ry. Co. v. *Wellman,* 143 U. S. 339, l. c. 345.

State of Neb. v. *Adams Express Co.,* 85 Neb. 25, 42 L. R. A. (N. S.) l. c. 401.

Mo. Rate Cases, 230 U. S. 474, 33 Sup. Ct. Rep. l. c. 979.

Minn. Rate Cases, 230 U. S. 352, 33 Sup. Ct. Rep. 762.

Kansas City Southern Ry. Co. v. *U. S.,* 52 L. R. A. (N. S.) l. c. 51.

Company v. *Lewis,* 180 N. Y. Supp. l. c. 586.

Ark. Rate Cases, 187 Fed. 290.

State v. *Virginia & T. R. Co., et al.,* 24 Nev. 53, 49 Pac. 945.

Smythe v. *Ames,* 169 U. S. 466, 18 Sup. Ct. Rep. 418.

Union Pacific R. R. Co. v. *U. S.,* 99 U. S. 402.

Consolidated Gas Co. v. *N. Y.,* 157 Fed. 849.

Cedar Rapids Gaslite Co. v. *Cedar Rapids,* 144 Iowa 426, 48 L. R. A. (N. S.) 1025.

Galveston Electric Co. v. *Galveston,* 258 U. S. 388, 42 Sup. Ct. Rep. l. c. 356.

Company v. *Nixon,* 181 N. Y. Supp. 623.

Re North Adams, 27 Mass. G. & E. L. C. R. 17.

Legg v. *Company,* 1 Calif. R. C. R. 11.

In re Freight Rates, 9 I. C. R. 382.

Ill. Cent. R. R. Co. v. *Interstate Commerce Com.,* 206 U. S. 441, 27 Sup. Ct. Rep. 700.

Darnell v. *Edwards,* 244 U. S. 564, 37 Sup. Ct. Rep. 702.

State ex rel. v. *Public Service Commission,* 252 S. W. l. c. 452.

10 C. J. 411, 12, 13, 18.

10 Fletcher Cyc. Cor. pp. 747, 748.

Aetna Insurance Company, et al. v. *Hyde,* 285 S. W. l. c. 70, 71, 72, 78.

Aetna Insurance Company, et al. v. *Travis,* 259 Pacific, l. c. 1076.

IV.

All of the fire insurance companies in Missouri, including appellant, selected their own forum and proceeded to seek a joint review through the state courts as to the validity of the 10 per cent reduction order; the decision of the Missouri Supreme Court sustaining such reduction was undisturbed by the Supreme Court of the United States; the decision of the three-judge court in refusing a temporary injunction to again litigate such reduction was proper as the matter was then res adjudicata on all questions presented.

Detroit & M. R. Co. v. *Michigan R. R. Com., et al.*, 203 Fed. l. c. 871.
Detroit & Mackinac Ry. v. *Mich. R. R. Com.*, 235 U. S. l. c. 404, 406.
State of Missouri v. *C. B. & Q. R. R. Co.*, 244 U. S. l. c. 539, 541, 542.
Puget Sound Electric Ry. v. *Lee, et al.*, 207 Fed. l. c. 865.
Baltimore S. S. Co., et al. v. *Phillips*, 274 U. S. l. c. 321.
Fugurul v. *Rivera*, 232 U. S. l. c. 374.
Smith v. *Apple*, 6 Fed. (2d) l. c. 563.
Pierce v. *National Bank of Commerce in St. Louis*, 268 Fed. l. c. 495.

V.

While the decision of the three-judge court is not conclusive on this court, yet great deference will be paid to its findings, and where the decision was justified by both the law and the facts, as in this case, this court will not disturb same.

Chicago, Great Western Ry. Co. v. *Kendall, Governor, et al.*, 266 U. S. l. c. 100.
United Fuel Gas Co. v. *Public Service Com. of West Virginia, et al.*, 278 U. S. l. c. 326.
Meccano, Ltd., v. *John Wanamaker, New York*, 253 U. S. l. c. 141.

VI.

The Missouri Fire Insurance Rating Act is constitutional. Fire insurance is a business affected with a public interest and it is well-settled that a state may regulate fire insurance rates.

National Union Fire Insurance Co. v. *Wanberg*, 260 U. S. l. c. 73.

German Alliance Insurance Co. v. *Lewis*, 233 U. S. 389, 34 Sup. Ct. Rep. 612; L. R. A. 1915, 1189.

Insurance Co. of North America, et al. v. *Welch, Ins. Com'r, et al.*, 49 Okla. 620, 154 Pac. l. c. 50.

State ex rel. Waterworth v. *Harty, Superintendent*, 278 Mo. l. c. 692.

Aetna Insurance Co., et al. v. *Hyde, Superintendent*, 315 Mo. 13, 285 S. W. 65.

Henderson v. *McWaters*, 104 S. C. 268.

Martin v. *Howard*, 96 Neb. 278, 147 N. W. 689.

Company v. *Barnes*, 189 Fed. 769.

Company v. *Railroad*, 77 N. H. 6, 45 L. R. A. (N. S.) 845.

People v. *Company*, 126 Ill. App. 636.

12 C. J. 850.

ARGUMENT.

I.

Since this appeal was taken, appellant and all other fire insurance companies doing business in Missouri have voluntarily put the 10 per cent reduction in effect. Inasmuch as the suits in the District Court were to prevent such reduction from going into effect, the question is now a moot one, and this appeal should be dismissed.

Since November 15, 1922, when the Superintendent of the Insurance Department of the State of Missouri ordered a reduction of 10 per cent in fire insurance rates, appellant and every other fire insurance company in Missouri has litigated the confiscatory effect of such reduction. The Supreme Court of Missouri held against them and the Supreme Court of the United States held against them. They then went into the District Court for individual injunctions and that court refused a temprorary injunction to one hundred and fourteen companies, of which appellant is one, and all of such companies appealed to this court, but are presenting this case as typical of the others.

The only relief asked in the District Court was a temporary injunction to restrain the officials of the State from putting this 10 per cent reduction order in effect. It was strenuously urged that to put such reduction order in effect would require appellant and all other companies to do business at a loss, and that was the question that has been litigated for about seven years.

Since then, and on the 9th day of August, 1929, and after this appeal was taken to this court, appellant and all of these other one hundred and fourteen fire insurance companies doing business in Missouri have voluntarily and of their own accord put this 10 per cent reduction in effect, and the policyholders of Missouri are securing the benefits of such reduction.

While the matter may not properly be before this court, yet in view of the actual records which we will submit, this court should know the condition which really exists at this time. The first notice received by the Insurance Department of Missouri stating that the 10 per cent reduction order would be put in effect was received August 9, 1929, and is as follows:

"Missouri Inspection Bureau
Fire Insurance Rating
1330 Pierce Bldg.
St. Louis, Mo.

August 8, 1929.

Honorable Joseph B. Thompson,
Superintendent of the Insurance Department
of the State of Missouri.

Dear Sir:

On behalf of each of the subscribers to Missouri Inspection Bureau, we do (under protest that order of the Superintendent of Insurance Department of Missouri of date October 9, 1922, ordering a reduction in rates subsequently designated to apply as of February 1, 1928, to all classes of fire, lightning, hail and windstorm insurance, is an unconstitutional invasion of the rights of each of such subscribers guaranteed to it by the Fourteenth Amendment of the Federal Constitution,) hereby make filing under such protest, of a reduction in rates of ten per cent

upon fire, lightning, hail and windstorm insurance upon all classes as of February 1, 1928, except automobile insurance.

Yours very truly,

(signed) Waterworth & Terry.
Managers

Missouri Inspection Bureau."

"The State of Missouri
Insurance Department

Certified Copy

I, Jos. B. Thompson, Superintendent of the Insurance Department of the State of Missouri, do hereby certify that the annexed pages are a true and correct copy of the original letter received from the Missouri Inspection Bureau, 1330 Pierce Bldg. St. Louis, Missouri, dated August 8, 1929, relating to a reduction in rates of ten per cent upon fire, lightning, hail and windstorm insurance upon all classes as of February 1, 1928, which said original is now on file in this department.

In Witness Whereof, I have hereunto set my hand and caused to be hereto affixed the Seal of said Department, at my office in the City of Jefferson, this 18th day of October, 1929.

(signed) Jos. B. Thompson,
Superintendent.

(Seal) By.....
Chief Clerk."

Thereafter, and on the 9th day of August, 1929, the Missouri Actuarial Bureau at St. Louis, representing all of the fire insurance companies doing business in Missouri under the Missouri Statutes, notified the Insurance Department of Missouri that such reduction had actually been put into effect, and a certified copy of such notice is as follows:

"Missouri Inspection Bureau
Fire Insurance Rating
1330-1346 Pierce Bldg.

James A. Waterworth
Paul W. Terry
Managers

St. Louis, Mo.

Branch Offices
Kansas City
St. Joseph
Hannibal
Joplin

August 9, 1929.

To Agents:

On behalf of each of the subscribers to the Missouri Inspection Bureau, we have filed with the Insurance Department a reduction in rates of ten per cent upon fire, lightning, hail and windstorm insurance upon all classes as of February 1, 1928.

In accordance with such filing, you are advised that all rates upon all classes of fire, lightning, hail and windstorm insurance, (*except automobile insurance*), rates for which are published by the Missouri Inspection Bureau, are subject to a reduction of ten per cent (10%). This reduction shall not be applicable to any policy issued effective before February 1, 1928, and now in force; and shall not be made applicable during the term for which such policy was issued by means of endorsement, *pro rata* cancellation, issuance of new policy in lieu thereof or any other device.

Under the above mentioned filing, refund should be made to policyholders upon all policies issued effective on or after February 1, 1928, such refund to be in the amount of ten per cent (10%) of all premiums on fire, lightning, hail and windstorm classes on Missouri property, *except automobile insurance.* Extreme care should be exercised to see that the refund goes to the proper party where there have been cancellations, assignments of policies and similar changes. The details of these refunds may come under the scrutiny of the Insurance Department or the courts; therefore it is especially important that your records and those of your companies be accu-

rate and complete. A supply of the receipt which must be signed by the assured is being sent you under separate cover from this office. Additional supply to meet your needs may be obtained upon application.

This filing and these refunds are made under protest that order of the Superintendent of Insurance Department of Missouri of date of October 9, 1922, ordering a reduction in rates subsequently designated to apply as of February 1, 1928, to all classes of fire, lightning, hail and windstorm insurance, is an unconstitutional invasion of the rights of each of such subscriber guaranteed to it by the Fourteenth Amendment of the Federal Constitution. The subscribers to the Missouri Inspection Bureau, as you are well aware, have undertaken only to assert and establish their legal rights in the courts, which is the right of every citizen, and they are continuing their efforts along this line until these legal rights are definitely established.

Yours very truly,

Waterworth & Terry,
Managers."

These records are official records in the office of the Insurance Department of Missouri at Jefferson City, and appellant will not question them. The question therefore is, may these insurance companies litigate a 10 per cent reduction order for seven years and then voluntarily and of their own accord put the same into effect and still be entitled to be heard in this court upon the failure of the District Court to grant a temporary injunction to restrain such reduction from going into effect. We contend that it is a moot question, and insist that this appeal should be dismissed because of the voluntary action of the appellant itself.

One of the latest expressions of this court on this point is *United States ex rel. Norwegian Nitrogen Company* v. *Tariff Commission,* 274 U. S. 106. In holding that a question was a moot one where the President had acted in fixing a new rate of duty, Mr. Justice Stone, at page 110, said:

> "We conclude that the case had become moot before the review below and that it is unnecessary for us to indulge in a discussion of the merits."

And at page 111, in holding that this court would not pass upon a moot question, he said:

> "Assuming that the plaintiff is entitled to a hearing of the character demanded whenever an investigation is had, which we do not decide, it would be an idle ceremony to require such a hearing upon an investigation which we may not command and which may never be made. In such circumstances there can be no effectual relief by mandamus and the Court of Appeals should have remanded the cause with directions to dismiss the petition as moot. *Brownlow* v. *Schwartz,* 261 U. S. 216; *Mills* v. *Green,* 159 U. S. 651, 653."

In this particular case an injunction was asked to restrain the officials of the State from putting into effect a 10 per cent reduction. After the case was appealed to this court appellant voluntarily put such reduction into effect, and in holding that this court will not consider the question because moot, Mr. Justice Sutherland, in *Brownlow, et al., Commissioners of the District of Columbia, et al.* v. *Schwartz,* 261 U. S. l. c. 217, said:

> "This court will not proceed to a determination when its judgment would be wholly ineffectual for want of a subject matter on which it could operate. An affirmance would ostensibly require something

to be done which had already taken place. A reversal would ostensibly avoid an event which had already passed beyond recall. One would be as vain as the other. To adjudicate a cause which no longer exists is a proceeding which this court uniformly has declined to entertain. See *Mills* v. *Green*, 159 U. S. 651; *Codlin* v. *Kohlhausen*, 181 U. S. 151; *Little* v. *Bowers*, 134 U. S. 547, 556; *Singer Manufacturing Co.* v. *Wright*, 141 U. S. 696, 699; *American Book Co.* v. *Kansas*, 193 U. S. 49; *United States* v. *Hamburg-American Co.*, 239 U. S. 466, 475; *Berry* v. *Davis*, 252 U. S. 468, 470; *Board of Public Utility Commissioners* v. *Compania General de Tabacos de Filipinas*, 249 U. S. 425; *Commercial Cable Co.* v. *Burleson*, 250 U. S. 360; *Heitmuller* v. *Stokes*, 256 U. S. 359.

"It is urged that the permit was issued by the Inspector of Buildings only because he believed it was incumbent upon him to comply with the judgment of the Court of Appeals and avoid even the appearance of disobeying it. The motive of the officer, so far as this question is concerned, is quite immaterial. We are interested only in the indisputable fact that his action, however induced, has left nothing to litigate. *American Book Co.* v. *Kansas, supra.* The case being moot, further proceedings upon the merits can neither be had here nor in the court of first instance. To dismiss the writ of error would leave the judgment of the Court of Appeals requiring the issuance of the mandamus in force—at least apparently so—notwithstanding the basis therefore has disappeared. Our action must, therefore, dispose of the case, not merely of the appellate proceeding which brought it here. The practice now established by this court, under similar conditions and circumstances, is to reverse the judgment below and remand the case with directions to dismiss the bill, complaint or petition. *United States* v. *Hamburg-American Co., supra; Berry* v. *Davis, supra; Board of Public Utility Commissioners* v. *Compania General de Tabacos de Filipinas,*

supra; Commercial Cable Co. v. *Burleson, supra; Heitmuller* v. *Stokes, supra.*"

We are familiar with the case of *Groesbeck et al.* v. *Duluth, South Shore & Atlantic Railway Company,* 250 U. S. 607, but there is quite a difference between that case and this one. There a two-cent passenger act was passed by the legislature and a suit was brought to prevent it from going into effect. Upon a temporary injunction being granted, the railroad was required to impound and there was eight hundred thousand dollars in possession of the court, and this court naturally held that although the law was later repealed it could not dispose of the matter without considering the effect of such reduction as to the persons to whom this money belonged. In this case no impounding was had, but the record shows the companies simply have a bond for about one million dollars and, as the refund will amount to over twelve million dollars, clearly an attempt will have to be made by the policyholders to recover their money. Another difference is that in this case appellant and all other fire insurance companies litigated the effect of this reduction through the courts of Missouri and on to the Supreme Court of the United States, and when that court refused to interfere with such reduction, the matter was at an end as to all past experiences and there was nothing for the companies to do but to refund.

Inasmuch as appellant has voluntarily put this reduction into effect, there is nothing for this court to do except to dismiss its appeal, a held by this court in *Allen* v. *Georgia,* 166 U. S. l. c. 140:

> "In civil cases it has been the universal practice to dismiss the case whenever it became apparent that there was no real dispute remaining between the plaintiff and the defendant, or that the case had been settled or otherwise disposed of by agreement of the parties, and there was no actual controversy pending. *Lord* v. *Veazie,* 8 How. 251; *Gaines* v. *Hennen,* 24 How. 553, 628; *Cleveland* v. *Chamberlain,* 1 Black, 419; *Wood-Paper Co.* v. *Heft,* 8 Wall. 333; *Dakota County* v. *Glidden,* 113 U. S. 222; *Little* v. *Bowers,* 134 U. S. 547; *California* v. *San Pablo &c. Railroad,* 149 U. S. 308."

In *Alejandrino* v. *Quezon et al.,* 271 U. S. 528, Mr. Chief Justice Taft refused to pass upon an alleged wrongful suspension of an officer in the Philippine Islands. Before the case reached that court the term of suspension was over. It was insisted, however, that the court should pass upon the matter as affecting the salary which was due such officer during such suspension. This the court refused to do because only ancillary or incidental to the main purpose of the suit, which was for restoration. The facts in this case are similar to the ones in the present suit and, after refusing to take jurisdiction, the court at page 535 said:

> "The case having become moot as respects its main features, and the other feature being incidental and not in itself a proper subject for determination as now presented, further steps looking to an adjudication of the cause can neither be had here nor in the court below. In this situation we must, following the established practice of this court, vacate the judgment below and remand the cause with directions to dismiss the petition without costs to either party. *Public Utility Commissioners* v. *Compania General de Tabacos de Filipinas,* 249 U. S. 425; *Brownlow* v. *Schwartz,* 261 U. S. 216, and cases cited."

In 2 Ruling Case Law, page 169, it is said:

"When, pending the appeal, the circumstances change to such an extent that the appeal involves merely a moot question, it will, as a general rule, be dismissed. Thus if the term of imprisonment expires pending an appeal by the jailer from a decision in a *habeas corpus* proceeding releasing a prisoner from custody, the appeal will be dismissed. On the same principle an appeal from an order granting a writ of mandamus will be dismissed, or the order granting the writ affirmed irrespective of the merits of the appeal, where it appears that the act which the writ commands to be performed, has been performed, and of course the same is true where an event occurs pending an appeal from an order refusing the writ which renders it impossible for the court to grant the relief sought."

And in 27 Ruling Case Law, page 82, it is said:

"It is the general rule that a real, and not a fictitious, federal question is essential to the jurisdiction of the supreme court over the judgments of state courts. The assertion of a federal right must not be so wanting in foundation and so unsubstantial as to be devoid of all merit, and frivolous. And such question may have been so explicitly disposed of by prior decisions as to afford no basis for controversy. Futhermore, the supreme court will not undertake to determine moot questions, even with the consent of the parties."

And again in 1 Ruling Case Law, page 317, it is said:

"A cause of action must relate to a real controversy. Courts do not sit for the purpose of determining speculative and abstract questions of law, or laying down rules for the future conduct of individuals in their business and social relations; but are confined in their judicial action to

> real controversies wherein the legal rights of parties are necessarily involved and can be conclusively determined."

Many other cases could be cited to sustain the contention of appellee that when appellant voluntarily put this reduction into effect, there is nothing here for the court to consider, and either the judgment must be reversed with directions for the District Court to dismiss the bills, or the appeal should be dismissed here. These companies litigated this question clear to the Supreme Court of the United States and the decision was against them. It became *res adjudicata* and when they went into the District Court to ask for an injunction to again litigate the same matter, it was rightfully refused. The court held that their petitions failed to state any cause of action and that they had bound themselves by their stipulation and would not be allowed to violate it. This court, under such circumstances, will not assume jurisdiction, but will dismiss the appeal.

It may be that appellant will say that it put this full reduction in effect under protest and for the reason that it was afraid of being penalized. The rule is universal in America that when a carrier in good faith is litigating the confiscatory effect of a reduction order, all penalties are suspended and it is immune therefrom. Otherwise, the doors of the court would be closed to a litigant desiring in good faith to question a reduction.

As a matter of fact there is no merit to appellant's contention that this reduction order, effective November 15, 1922, did not become effective until the first of February, 1928, when it is said the Superintendent of In-

surance designated classes. The lower court held with appellant on this point, but the matter was not fully presented because not thought important in that litigation. It was an afterthought to appellant because, although it filed its petition for a temporary injunction on February 14, 1928 (R. 1), this thought did not occur to it until it amended its bill on March 29, 1928. (R. 4).

Under the Missouri Rating Act the State has authority to regulate fire, lightning, hail and windstorm insurance, and nothing else. On October 9, 1922, the Insurance Department, after a full hearing, ordered a reduction "in the rates now charged by the aforesaid companies on fire, lightning, hail and windstorm insurance business written in the State of Missouri," effective November 15, 1922 (R. 5).

It is true that in the same order the Superintendent requested the companies to "submit a class or classes, which meets the approval of the Superintendent of Insurance." Also under Section 6283, Revised Statutes of Missouri, 1919, it is provided that if the companies do not designate such classes, the superintendent will. Obviously, the superintendent did designate the classes of fire, lightning, hail and windstorm. To say that they could have been more definitely stated is without merit. Appellant and other companies thereupon went into the State Circuit Court and secured an injunction, or an order amounting to the same thing, against the Insurance Department to prevent it from putting such 10 per cent reduction order in effect, and thereafter the matter was litigated clear to the Supreme

Court of the United States. After appellant went into the State Circuit Court there was nothing more the Insurance Department could do, and appellant cannot profit by its own wrongful failure and refusal to designate such classes, if such designation was necessary. The Insurance Department could not designate because it had already done so, and was enjoined by the court. Appellant did not designate and when, on February 1, 1928, the superintendent called its attention to such reduction, it clearly dates back to November 15, 1922.

The Supreme Court of Missouri passed on this exact question in the case of *State ex rel. Hyde, Superintendent*, v. *Westhues, Judge*, 290 S. W. l. c. 448:

> "The 10 per cent reduction order of October 9, 1922, was never revoked by the superintendent of insurance; *it was not suspended or superseded by the institution of the suit to cancel and set it aside.* Notwithstanding the pendency of such action, *it was in full force and effect on November* 9, 1923, when the 15 per cent reduction order was made. The latter order read:
>
> > 'I have this day ordered a reduction of 15 per cent in rates now authorized by the Missouri Inspection Bureau and being collected by the aforesaid (insurance) companies.'
>
> "It did not in terms displace the order of October 9, 1922; in legal contemplation it did not do so. It effected, if anything, another and further reduction—to the extent of 5 per cent—in the rates. It was, therefore, a distinct and independent order, having no relation to or bearing upon the order then under review in the Aetna case."

The reduction order was effective November 15, 1922, as to all companies and the superintendent had no

authority to designate another day and did not attempt to do so. If this court cares to go into this question, it will have no difficulty in arriving at the conclusion that the effective date of such reduction order was November 15, 1922, as to all companies.

Appellant says that the case of *Banton* v. *Belt Line Ry.*, 268 U. S. 413, allows it to voluntarily put a rate reduction in effect and then to contest the validity of such reduction as to past experience. The case does not so hold. There many lines were involved and the company concluded to attack an order relating to certain of its lines. All this court held was that "it was not bound to attack the prescribed rates as to all the routes," and that "the effect of the injunction on the business of the Third Avenue Company and its competitors is not involved in this suit," meaning thereby of course that when a carrier puts a reduction in effect as to certain lines, it may litigate the effect of such reduction as to other lines, but those lines on which a reduction has been put in effect are not involved in the hearing.

In this case the total reduction was voluntarily put in effect by appellant after its appeal to this court. All matters of the past are thereby closed. If appellant desires to litigate the future effect of this reduction it should, under the Missouri statute, apply for an increase of rates, and it cannot be assumed that the Insurance Department will not fairly hear its application and fairly decide same. If the decision is against it, it may then resort to the courts regarding the future effect of the then effective rate. In this case appellant

voluntarily put this reduction in effect and wishes to still litigate the confiscatory nature of such reduction as to its past experience. This it cannot do. It has become a moot question in this court and the appeal should be dismissed.

The Banton case, *supra*, instead of being an authority for appellant, is a very decided authority for appellees. A suit filed to enjoin the enforcement of an order prescribing five-cent fare on certain lines of railway in New York City. As to certain other lines no injunction was sought. This court held that the street railway was not compelled to litigate the confiscatory effect of this order as to certain of its lines unless it wanted to. As to those lines it could accept the order and put the rate in effect. As to other lines it could contest the confiscatory effect of such reduced rate.

In this case the Insurance Department ordered a reduction of 10 per cent in fire insurance rates on all fire, lightning, hail and windstorm risks. Had appellant voluntarily put this reduction order in effect as to fire insurance, it could still have litigated its confiscatory effect as to lightning, hail and windstorm insurance. Under such circumstances the situation would be the same as in the Banton case, *supra*, but when appellant voluntarily put this reduction in effect as to all classes, that is, fire, lightning, hail and windstorm, then it cannot litigate its confiscatory effect, particularly as to its past experience. The question becomes a moot one, and this court will not pass upon the effect of this reduction.

II.

The three-judge court in this case rightfully held that it would not consider the granting of a temporary injunction until restitution was made of this money wrongfully collected and retained because of a stipulation agreeing to refund same. The maxim of "He who seeks equity must do equity" was properly upheld.

In 1922 the Insurance Department of Missouri, after a full hearing, ordered a reduction of 10 per cent in fire insurance rates, effective November 15, 1922. All companies had stipulated that after such reduction was ordered they would proceed through the state courts and to the Supreme Court of the United States, and if the decision was against them, they would make full restitution. (R. 85.)

They proceeded through the State Circuit Court and the Supreme Court of Missouri, and that court sustained the reduction order. (*Aetna Insurance Company* v. *Hyde,* 315 Mo. 13; 285 S. W. l. c. 78.) They then went to the Supreme Court of the United States by certiorari and that court refused to disturb such finding. (*Aetna Insurance Company* v. *Hyde,* 275 U. S. 440.)

Appellant and all other companies then proceeded to file separate suits in the District Court for the Western District of Missouri and asked another injunction against the state officers to prohibit such reduction from going into effect after it had been passed upon by the Supreme Court of Missouri and this court. A three-judge court was assembled and denied appellant an injunction because of its refusal to make restitution, as it had agreed to do. The court also held that the

bill failed to sate a cause of action because not fully disclosing the experience of the companies.

One of the oldest and most familiar maxims in equity is "he who seeks equity must do equity." The District Court held that it could not grant a temporary injunction because of the failure of all of these insurance companies to comply with their stipulation and make restitution. It is unconscionable and unthinkable that these same companies can again litigate this same question and keep all of these excess premiums which they wrongfully collected under an order of the court, which has since been set aside. The rule is universal throughout America that where one receives something from another under an order of a court, and later that order is set aside, restitution must be made of all that was received under such order.

The District Court refused a temporary injunction as to one hundred and fourteen companies, of which appellant is one, and in stating the rule that appellant cannot violate the plain terms of a stipulation and at the same time ask relief and in announcing the doctrine contended for, said (R. 108, 109):

> "Even if they could not begin an entirely new and different attack upon the order of reduction such condition would not meet the claim of defendants that they are coming into a court of equity with unclean hands because they stand as beneficiaries under a stipulation respecting this very matter and which they refuse to carry out. We think this position of defendants is well taken. The underlying principle in the equitable rule of 'unclean hands' is that a court of conscience will not grant relief to one who, at the time, is acting inequitably in connection with the subject-matter of

the controversy. We express no opinion thereon but it may be that the stipulation was not intended to or that it could not prevent the complainants bringing separate actions to attack the reduction order, either through invalidity of the statutes upon which power to make the order must rest or through defects inhering in the particular order, but the facts remain that the stipulation required repayment of the excess collections if a particular stipulated proceeding resulted adversely to these complainants; that such result occurred; that every benefit to complainants from the stipulation has been received by them; that those benefits are very substantial and that they refuse to refund. Unless they do so, they will rob the other parties to the stipulation of every possible benefit therefrom, although such parties have fully performed the stipulation upon their part. Such action by the complainants is highly unconscionable and should not be permitted by a court of equity. It is analogous to that of parties to a contract where the complainants seek to act upon a rescission of the contract while retaining substantial fruits thereof. There, a court of equity will compel a restoration of the *status quo* before examining the rights of the parties. Here, the complainants are seeking to avoid the effect of the stipulation while retaining every substantial benefit (Fol. 125) thereof. They should comply with the stipulation and make the refunds required thereby before asking any equitable relief. When that status has been fully established they will be in position to proceed to have their rights determined and protected and not before.

It is argued that to require this repayment would result in injustice to these companies if it should be determined later that the order was confiscatory as to them or any of them, because it would be impossible ever to recover back the repayments thus made to the policyholders. It is probable that such recovery would be impossible

or, at any rate, highly improbable. But such result is no reason for granting the injunctions. If that is the result, it is one which they have voluntarily brought upon themselves. It does not excuse them nor justify this court in disregarding a basic prerequisite to the exercise of equitable powers. The so-called 'rule of convenience' which leads courts of equity to preserve a status until the rights of the parties can be determined has no application here. The situation here is that equity will not move to protect the rights of a party until that party has placed itself in a position where it can ask a court of equity for such protection. As to each of these complainants who were parties to the stipulation the prayer for temporary injunction should be denied without prejudice to renewal upon a showing of the above refund by the particular complainant seeking such renewal."

The court properly refused a temporary injunction because (a) appellant had stipulated to make restitution in case the decision was against it and, having failed and refused to do so, it was entitled to no relief; (b) regardless of the stipulation, it was the duty of appellant to refund all excess premiums collected under an order of the court, which was later set aside.

Even had there been no stipulation in this case, the rule would have been the same. Appellant and all other fire insurance companies in Missouri collected more than twelve million dollars in excess premiums, and later on when the reduction order was sustained by the Supreme Court of Missouri and undisturbed by the Supreme Court of the United States, there was nothing to do but to make restitution. Having failed to make restitution, it is difficult to understand why appellant figures that it is entitled to litigate this

question again and still retain the money wrongfully collected. The injunction was denied only until and at such a time as restitution was made. After it has been made appellant may renew its application for a temporary injunction as to its future experience.

It was admitted by these insurance companies that they wrongfully retained this money due the policy-holders and it naturally follows that the District Court was without jurisdiction to issue a temporary injunction, and should not in good conscience have done so without first requiring them to make restitution. In *West Texas Loan Company, et al.* v. *Beckham,* 201 S. W. l. c. 583, the Court of Appeals of Texas, in so holding, said:

> "It has likewise been held that, where plaintiff admits a sum of money to be due or equitably due to defendant, his petition must show that he has paid or offered to pay, or must contain an averment of his willingness to pay such sum of money to entitle him to relief by injunction. 32 C. J. p. 334; *Spann* v. *Sterns,* 18 Tex. 556; *Weaver* v. *Nugent,* 72 Tex. 272, 10 S. W. 458, 13 Am. St. Rep. 792; *Carden* v. *Short,* (Tex. Civ. App.) 31 S. W. 246; *Carr* v. *Foelich et al.,* (Tex. Civ. App.) 220 S. W. 137 (error refused)."

21 C. J., page 172, in announcing that one who seeks equity must do equity, says:

> "He who seeks equity must do equity. The maxim expresses a cardinal principle, and is one of the oldest in equity jurisprudence. It is of most extensive application, being applicable to all classes of cases whenever necessary to promote justice."

This appellant is not entitled to any relief until it first makes restitution of that which it is wrong-

fully withholding from the policyholders in Missouri, which it secured under an order of the court which has since been set aside. In *United States* v. *Trinidad Coal and Coking Company,* 137 U. S. l. c. 171, the court said:

> "Let the wrongdoer first restore what it confesses to have obtained from the government by means of a fraudulent scheme formed by its officers, stockholders and employees in violation of law."

In the famous oil case, *Pan American Company* v. *United States,* 273 U. S. 456, the owners of the lease contended that they should be allowed, in the way of a return, all the money which they expended on the lease, but the court having found that they corruptly and illegally bribed the Secretary of the Interior into letting them have these leases, refused to adopt this principle in their behalf, but in announcing the rule, in no uncertain terms, at page 505, said:

> "In suits brought by individuals for rescission of contracts the maxim that he who seeks equity must do equity is generally applied, so that the party against whom relief is sought shall be remitted to the position he occupied before the transaction complained of. 'The court proceeds on the principle, that, as the transaction ought never to have taken place, the parties are to be placed as far as possible in the situation in which they would have stood if there had never been any such transaction.' *Neblett* v. *Macfarland,* 92 U. S. 101, 103. And, while the perpetrator of the fraud has no standing to rescind, he is not regarded as an outlaw; and, if the transaction is rescinded by one who has the right to do so, 'the courts will endeavor to do substantial justice so far as is con-

> sistent with adherence to law.' *Stoffela* v. *Nugent*, 217 U. S. 490, 501. The general principles of equity are applicable in a suit by the United States to secure the cancellation of a conveyance or the rescission of a contract. *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 339; *United States* v. *Stinson*, 197 U. S. 200, 204; *State of Iowa* v. *Carr*, 191 Fed. 257, 266; cf. *Mason* v. *United States*, 260 U. S. 545, 557, *et seq.* But they will not be applied to frustrate the purpose of its laws or to thwart public policy."

In holding that a court of equity should not grant an injunction until the parties are restored to their former positions, Mr. Justice Miller in *Thomas, Trustee* v. *Brownville, Fort Kearney, and Pacific Railroad Company*, 109 U. S. l. c. 526, said:

> "In this condition of the case they are amenable to the rule that they who seek equity must do equity. It is just that they should pay a fair price for what they have received; that this mortgage, given for the construction of the road, though excessive by reason of the fraud in the contract, should stand for the reasonable value of what the company actually received in the way of construction. To permit these intervenors to defeat the mortgage on any other terms would be unjust, and would make the court the instrument of this injustice."

Under an order of the Circuit Court of Cole County, these insurance companies collected more than $12,000,000 from policyholders in Missouri in the way of excess premiums and when the highest court of the land set aside the order, it was the duty of these insurance companies to make immediate restitution of this sum, and the Supreme Court of the United States, in

the case of *Neblett* v. *Macfarland,* 92 U. S. 103, in laying down the rule that restitution must be made, at page 103 said:

> "In cases of this character the general principle is, that he who seeks equity must do equity; that the party against whom relief is sought shall be remitted to the position he occupied before the transaction complained of. The court proceeds on the principle, that, as the transaction ought never to have taken place, the parties are to be placed as far as possible in the situation in which they would have stood if there had never been any such transaction. *Bellamy* v. *Sabine,* 2 Phil. 425; *Samy* v. *King,* 5 H. L. 627; *W. B. of Scotland* v. *Addie,* L. R. 1 Scotch App. Cas. 162; *Gatley* v. *Newell,* 9 Ind. 572; *Johnson* v. *Jones,* 13 Sm. & M. 580; Kerr on Fraud, 335, 343. This is, no doubt, the general rule."

In holding that one who seeks the aid of equity must pay for the value of work done, Chief Justice Smyth of the Supreme Court of the District of Columbia, in *Talbott* v. *Hill, et al.,* 261 Fed. l. c. 246, said:

> "The question would then arise as to whether or not Talbott could invoke the aid of equity for the purpose of discharging the security of his creditor while the debt remains unpaid. It is a maxim of equity that he who seeks equity must do equity. *Knox* v. *Gaddis,* 1 App. D. C. 341; *Buchanan* v. *Macfarland,* 31 App. D. C. 6, 21; *Thomas* v. *Brownsville, etc. R. R. Co.,* 109 U. S. 522, 526, 3 Sup. Ct. 315, 27 L. Ed. 1018; *Neblett* v. *Macfarland,* 92 U. S. 101, 103, 23 L. Ed. 471. In the Thomas case the company gave a mortgage to secure the payment of bonds which it had issued to certain persons who had contracted to build its road. The bonds not having been paid when they became due foreclosure was com-

menced. A defense was made on the ground that the contract on account of which the bonds were issued was fraudulent and void, foreclosure was resisted, and the court was asked to set aside the mortgage. It appeared that those claiming under the mortgage had done a certain amount of construction work for the company. The court, applying the principle that he who seeks the aid of equity must do equity, held that the company was bound to pay the value of the work done before it could have the relief prayed. To the same effect are *Driver, Adm'r* v. *Hudspeth,* 16 Ala. 348; *Merriam* v. *Goodlett et al.,* 36 Neb. 384, 54 N. W. 686; *Booth et al.* v. *Hoskins,* 75 Cal. 271, 17 Pac. 225; *Gage* v. *Riverside Trust Co.,* (C. C.) 86 Fed. 984. Talbott, in praying the court to free his property from the lien, without first paying or offering to pay the debt justly due, is certainly not doing equity, but rather seeking its aid in the perpetration of a wrong. Manifestly his request must be denied."

In holding that before one is entitled to an injunction he must himself discharge his own obligations to the plaintiff, the Circuit Court of Appeals for the Third Circuit, in an opinion by Davis, J., *Fullman* v. *Steel City Electric Co.,* 2 Fed. (2d Ed.) 4, l. c. 6, said:

"While the defendant has the right to have the court decree that title to the invention and letters patent is in it, and to require plaintiff to assign his right, title and interest in and to the patent to it, yet, before it can demand that its rights be enforced, it must discharge its own obligations to the plaintiff, by paying the expenses incurred by him in securing the patent.

"Pervading the administration of equity in all its branches are certain broad principles, so generally accepted and of such fundamental character that they have become known as maxims.

> One of the oldest and most venerable of these is that 'he who seeks equity must do equity.' *Hanson* v. *Neal*, 215 Mo. 256, 273, 114 S. W. 1073, 1078. It applies to one who affirmatively seeks equitable relief (*Columbus* v. *Mercantile Trust Co.*, 218 U. S. 645, 662, 31 S. Ct. 105, 54 L. Ed. 1193), but it is as appropriate to the conduct of the defendant as to that of the complainant (*Brown, B. & Co.* v. *Lake Superior Iron Co.*, 134 U. S. 530, 535, 10 S. Ct. 604, 33 L. Ed. 1021), and it should be applied in every case where its application is necessary in order to do justice (*Mutual Benefit Life Insurance Co.* v. *Brown*, 30 N. J. Eq. 193, 199). Having jurisdiction of this case on appeal, it is our duty and in our power to require the payment of these expenses. *Potter* v. *Beal*, 50 F. 860, 864, 2 C. C. A. 60."

The Supreme Court of Rhode Island in *Moncrief* v. *Palmer*, 114 Atl. 181; 17 A. L. R., l. c. 120, in holding that one must discharge his own obligations before appealing to a court of equity, said:

> "Whatever may be the method adopted by the legislature, however, although the legislative provision may go to the limit of our statute and declare the contract void and unenforceable, nevertheless courts of equity, in the absence of statute specifically contraining them to act differently, have insisted upon the equitable principle that he 'who seeks equity must do equity,' and have required the borrower, before he can be given the relief of cancellation of the contract, to perform the moral obligation resting upon him, and pay or offer to pay the principal of the loan with legal interest."

Since the decision of the Supreme Court of Missouri, and undisturbed by the Supreme Court of the United States between these same parties, *Aetna In-*

surance Company, et al. v. *Hyde,* 315 Mo. 13, these premiums collected in excess of the legal rate by these insurance companies are being wrongfully withheld from the policyholders, and in holding that these plaintiffs are not entitled to appeal to a court of equity without first making restitution, the Supreme Court of Washington in *Langley* v. *Devlin, et al.,* 163 Pac. 395; 4 A. L. R. 1. c. 42, said:

> "Respondents were put in no worse position by the alleged fraudulent acts of the appellants. On the contrary, they profited by them. The maxims, 'He who comes into equity must come with clean hands,' or, after suit is brought 'He who seeks equity must do equity,' mean no more than that he who has defrauded his adversary to his injury in the subject matter of the action will not be heard to assert a right in equity. Respondents have not been misled or overreached. By no act of appellants have they been worsted. In the application of principles it is important that we do not put one principle at war with another. While the courts will not, as a rule, measure equities between wrongdoers, they are quite as careful to deny to any man the advantage of his own wrong."

We will show under another point in this brief that these insurance companies cannot again litigate this experience which has been litigated. It is, to the whole world, a closed matter. It naturally follows, therefore, that restitution must be made up to the end of this period when the Supreme Court of the United States refused to disturb the opinion of the Supreme Court of Missouri. Until such restitution is made, these plaintiffs are in no position to come before a court of equity and ask relief. If they make

restitution and then desire to litigate the effect of this reduction in the future, or from now on, it may be that they can state an equitable case, but they certainly cannot state a case in equity while retaining all of this money wrongfully taken from these policyholders.

The late Judge Sherwood of the Missouri Supreme Court was very clear in all of his expressions and in *Kline* v. *Vogel*, 90 Mo. 239, in dealing with an equitable proceeding, asking the setting aside of a sale and an accounting for rents and profits, in applying the principle now contended for, at page 245 said:

> "And this being a proceeding in equity, will be governed by rules and principles prevalent in those courts where relief of that character is prayed. Among these rules, having application here, is one to be presently mentioned. The true meaning of the rule, whose frequency of invocation would seemingly argue a better knowledge of its import, that 'he who seeks equity must do equity,' is simply this: that where a complainant comes before a court of conscience invoking its aid, such aid will not be granted except upon equitable terms. These terms will be imposed as the price of the decree it gives him. The rule 'decides nothing in itself,' for you must first inquire what are the equities which the plaintiff must do in order to entitle him to the relief he seeks. *Hanson* v. *Keating*, 4 Hare, 1; *Neesom* v. *Clarkson, Id.*, 97; *Phillips* v. *Phillips*, 50 Mo. 603; *Erwin* v. *Blake*, 8 Pet. 18; Story Eq. Jur., Sec. 64, and cases cited. Thus, where a husband comes into a court of equity for relief as to any property of his wife, which he claims *jure mariti*, he will be obliged to submit to the terms of the court by making suitable provision for her, or else

assistance will be denied him. So, also, if a borrower of money on usurious interest seeks the cancellation of the instrument which evidences the debt, equity refuses its aid unless upon the condition that payment be made the lender of what is *bona fide* due him. The above are only a few out of a large number of examples which might be cited in illustration of the rule referred to, which finds its application not in questions of pleading nor by what the plaintiff offers to do therein, but in the form and frame of the orders and decrees, both interlocutory and final, whereby equitable terms are imposed as a condition precedent to equitable relief granted."

And at page 247, in holding that the maxim contended for relates to performance, just what we are asking in this case, said:

"Very often the case is so complicated, the equities involved therein so uncertain, that they can by no possibility be ascertained until after the most painstaking investigation by the chancellor. To require, therefore, that a plaintiff, in order to make his pleading good, in order to prevent his being sent out of court on account of a defective pleading, he should be compelled to do what the unascertained and unascertainable equities of his case demand, seems altogether unreasonable. The true theory of the maxim, 'he who seeks equity must do equity,' is not a question of pleading, but a question of performance—performance by the complainant of those conditions which a court of equity imposes 'as the price of the decree it gives him.'"

Restitution Must be Made.

There is no better settled principle of law than that where one receives something under an order of a court, which is later reversed, restitution must

be made of all that has been received under it. On such reversal the law raises an implied obligation or agreement on the part of the party securing the judgment or decree to restore all that has been obtained directly or indirectly by means of the same. The principle is fundamental and there could be no justice without it.

In 3 Cyc. 462, the rule is stated as follows:

> "It is the general rule that when a judgment, order or decree of the lower court has been reversed or vacated by the appellate court, *restitution will be made to the party aggrieved of all property and rights which he has lost by reason of such erroneous judgment, order, or decree,* and it is no reason for denying such restitution to the party aggrieved that the money was received by the other party in good faith."

In 18 Encyc. of Pl. & Pr. 781, the rule is thus stated:

> "Where a judgment or decree of an inferior court is reversed by a final judgment in a court of review, a party is in general *entitled to restitution of all things lost by reason of the judgment in the lower court* and accordingly the courts will, where justice requires it, promptly and as far as practicable place him as nearly as may be in the same condition he stood in previously."

In *Gott* v. *Powell,* 41 Mo. 416, the court states the doctrine, on page 420, as follows:

> "*The restitution to which the party is entitled upon the reversal of an erroneous judgment is everything which is still in the possession of his adversary.* Where a man recovers land in a real action, and takes possession or acquires title to land or goods by sale under execution, and the judgment is afterwards reversed, so far

as he is concerned his title is at an end, and the land or goods must be restored in specie—not the value of them, but the things themselves."

In *Railroad Co.* v. *Brown*, 43 Mo. 294, the doctrine again is clearly announced and adhered to, where it is held as follows:

"Where a judgment was reversed in the Supreme Court, and declared to be null and void, all of the proceedings had in pursuance of that judgment were vacated, and *defendant was entitled to be restored to the condition in which he stood previous to the judgment, and to restitution of everything that he had lost and which remained in the hands of the adverse party, his agent, attorneys, or privies;* and no suit is required to set aside a deed of land bought by an attorney of plaintiff in such judgment upon execution sale of defendant's property."

No stronger statement of the doctrine now contended for by the state can be found anywhere than appears in the decisions of the Supreme Court of the United States. In *Bank of the United States* v. *Bank of Washington*, 6 Pet. 8, 8 L. Ed. 299, there was an action in assumpsit, instituted to recover an amount realized through a judgment, which was afterwards reversed. The Supreme Court of the United States has most emphatically stated the rule and announced the doctrine to be applied, where, among other things, it held as follows:

"On the reversal of an erroneous judgment *the law raises an obligation in the party to the record, who has received the benefit of the judgment, to make restitution to the other party for what he has lost*; and the mode of proceeding to effect this object may be regulated according

to circumstances. Sometimes it is done by a writ of restitution, without a *scire facias* when the record shows the money has been paid, and there is a certainty as to what has been lost. In other cases, a *scire facias* may be necessary to ascertain what is to be restored. But as it respects third persons, whatever has been done under the judgment, whilst it remained in full force, is valid and binding.

"Where money is wrongfully and illegally exacted, it is received without any legal right or authority to receive it; and *the law at the very time of payment creates the obligation to refund it.* A notice to recover back the money does not even in such cases create the right to recover it back; that results from the illegal exaction of it; and the notice may serve to rebut the inference that it was a voluntary payment, or made through mistake."

In *Northwestern Fuel Co.* v. *Brock,* 139 U. S. 216, 35 L. Ed. 151, *Bank* v. *Bank, supra,* is heartily affirmed, where the court said beginning on page 219:

"The right of restitution of what one has lost by the enforcement of a judgment subsequently reversed has been recognized in the law of England from a very early period, and the only question of discussion there, has been as to the proceedings to enforce the restitution. Thus in Anonymous, 2 Salk. 588, it was held by Holt, Ch. J., that 'where the plaintiff has execution, and the money is levied and paid, and that judgment is afterwards reversed, there, because it appears on the record that the money is paid, the party shall have restitution without a *scire facias,* and there is a certainty of what was lost; otherwise where it was levied but not paid, there must then be a *scire facias* suggesting the matter of fact, viz., the sum levied etc.'

"The same doctrine has been fully recognized by this court in *United States Bank* v. *Bank of*

Washington, 31 U. S. 6 Pet. 817 (8: 299, 304). In that case the court, after observing that the party against whom an erroneous judgment has been enforced does not lose his remedy against the party to the judgment, said:

"'*On the reversal of the judgment the law raises an obligation in the party to the record, who has received the benefit of the erroneous judgment, to make restitution to the other party for what he has lost;* and the mode of proceeding to effect this object must be regulated according to circumstances. Sometimes it is done by a writ of restitution, without a *scire facias,* when the record shows the money has been paid, and there is a certainty as to what has been paid, and there is a certainty as to what has been lost. In other cases a *scire facias* may be necessary to ascertain what is to be restored. 2 Salk. 587, 588; Tidd's Pract. 936, 1137, 1138. And, no doubt *circumstances may exist where an action may be sustained to recover back the money.*' We are of opinion that the proceeding to enforce the restitution in the cases mentioned is under the control of the court, and that all needed inquiry can be had to guide its judgment in a summary proceeding, upon motion of the parties, the only requisite being that the opposite party shall be heard, so that in directing restitution no further wrong be committed. The restitution is not made to depend at all upon the question whether or not the court rendering the judgment reversed acted within or without its jurisdiction."

One of the leading cases on "restitution" is that of *Haebler* v. *Myers,* (N. Y.), 15 L. R. A. 588, in an opinion by Judge Vann:

"Restitution was remedy well known to the common law. Its object was to restore to an appellant the specific thing, or its equivalent, of which he had been deprived by the enforcement of the judgment against him during the pendency of his

appeal. It was not created by statute, but was exercised by the appellate tribunal as incidental to its power to correct errors, and hence the court not only reversed the erroneous judgment, but restored to the aggrieved party that which he had lost in consequence thereof. It was usually a part of the judgment of reversal which directed 'that the defendant be restored to all things which he had lost on occasion of the judgment aforesaid.' A writ of restitution was thereupon issued, provided the amount that the appellant had lost or paid under compulsion appeared of record, as by the return of an execution satisfied; otherwise process is the nature of an order to show cause was first issued, known as a '*scire facias quare restitutionam habere non debet.*' Toml. Law. Dict., title Restitution; 2 Lil. Abr. 472; Rolle, Abr. 778; *Westerne* v. *Creswick*, 4 Mod. 161; Wilkinson's case, Cro. Eliz. 465; *Goodyere* v. *Ince Cro. Jac.*, 246; Manning's case, 8 Coke, 94; 2 Tidd. Pr. 1033; 1 Burrill, Pr. 292."

Another leading case on this subject is that of *Hess* v. *Deppen*, 125 Ky. 425, 15 Am. & Eng. Ann. Cas. 670:

"'*When a judgment is reversed, restitution must be made of all that has been received under it; but no further liability should in any case be imposed.*' This case was followed in *Schnabel* v. *Waggener*, 118 Ky. 362, 80 S. W. 1125, 26 Ky. L. Rep. 258: It is also supported by the following authorities: *Mark* v. *Hyatt*, 135 N. Y. 306, 31 N. E. 1099, 18 L. R. A. 275; *Thompson* v. *Reasoner*, 122 Ind. 454, 24 N. E. 223, 7 L. R. A. 495; *Simpson* v. *Hornbeck*, 3 Lans. (N. Y.) 53; *Bryan* v. *Congdon*, 86 Fed. 221, 57 U. S. App. 505, 29 C. C. A. 670; *Fisher* v *Langbein*, 62 How. Pr. (N. Y.) 31, 25, Am. Dec. 598; *Hayden* v. *Shed*, 11 Mass. 500; *Peck* v. *McLean*, 30 N. W. 759, 36 Minn. 228, 1 Am. St. Rep. 665; 3 Cyc. 470; 18 Anc. Pl. & Pr. 884, and cases cited."

This question was also passed upon in a splendid opinion from the Supreme Court of Illinois in the case of *Cummings* v. *Mugge,* 94 Ill. 186, in which the court says:

> "Appellants, by their counsel, claim that the proofs taken show that the lumber in question was their property, and that while they were restrained by the injunction from meddling with the same, appellee wrongfully took and disposed of the same to his own use, and that the necessary expense of collecting and presenting this proof upon the assessment of damages was large; and counsel insist that appellants were entitled by law to have the value of the lumber and these expenses included in the assessment of damages.
>
> *"This position cannot be sustained. The service of the writ of injunction in no way authorized or caused the wrongful act of appellee in taking and converting the property.* The dismissal of the bill and the dissolution of the injunction were conclusive that the injunction was wrongfully sued out."

A very clear opinion holding that these policy-holders are entitled to restitution is the case of *Southern Railway* v. *Com'rs,* 196 Fed. 558:

> "Legally speaking, a rate statute must be held good until it is shown by the proof, as applied to a particular carrier, that the statute will prevent a fair and reasonable return upon the value of the property employed in the service, and until that is shown the rate statute must be held to be *prima facie* valid, and if it be afterwards repealed, shippers and passengers, as to transactions completed while it was in force, in the absence of a judicial condemnation of the rates, *have a vested right of action against the carrier for any excess charges above those allowed by the repealed statute while it was in force. Central of Georgia Railway Co.* v. *Railroad Commission of Alabama et al.,* (C. C.) 161 Fed. 979."

In *Brown* v. *Detroit Trust Company,* 193 Fed. 622, the Circuit Court of Appeals for the Sixth Circuit again stated the doctine to be applied, where it said at page 626:

> "Certainly, if restitution is possible, the judgment appealed from would be affected by the reversal. In the courts of the United States the rule is broadly settled that upon the reversal of an erroneous judgment *the law raises an obligation in the party to the record who has received the benefit of the judgment to make restitution to the other party for what he has lost,* and that the mode of effecting this result may be regulated according to circumstances. See *Bank of United States* v. *Bank of Washington,* 6 Pet. 8, 8 L. Ed. 299; *Ex Parte Morris* v. *Johnson,* 9 Wall. 605, 19 L. Ed. 799; *Northwestern Fuel Co.* v. *Brock,* 139 U. S. 216, 221, 11 Sup. Ct. 523, 35 L. Ed. 151."

The Missouri Supreme Court, after dismissing the petition of all of these insurance companies, upon holding the rate reduction order valid, retained jurisdiction to make any and all further orders it might desire. Such orders, of course, will provide for restitution, and a very clear statement of the rule allowing that court to proceed toward restitution, may be found in the case of *Railroad Company* v. *Barker,* 210 Fed. Rep. 902. Beginning at page 914, Judge McPherson said:

> "There have been many of these public utility rate cases before the courts, and in some of them there have been mere naked dismissals of the bills of complaint followed by a judgment for costs, but without other recitals in the decrees, nothing added and nothing subtracted. Such was done, as I understand, it in the Minnesota Rate Cases, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511. In the Arkansas Rate Cases, 230 U. S. 553, 33 Sup. Ct.

1030, 57 L. Ed. 1625, which are very much like these 13 cases, the court retained jurisdiction to the exclusion of the state courts for the purpose of ascertaining to whom and in what sums moneys were due because of rates paid during the life of the injunction beyond those allowed by the statute. I have before me the opinion by Judge Trieber of the Eastern District of Arkansas, filed within the past ten days. Judge Trieber discusses many questions in that opinion, reaching conclusions in nowise controlling here. In the Arkansas Rate Cases bonds in penalties of $1,000,000 were conditioned as follows:

" 'If it should eventually be decided that so much of this order as inhibits enforcement of the rates prescribed * * * that the complainant shall refund to the owners and holders of the certificates issued by it (showing the excess payments) the excess charges as shown by the same.'

"Judge Trieber was expressly adjudicating the effect of the bonds before him. The rule is that the court can retain the bonds and have all liabilities thereunder adjudicated, or the court may remit the same to another court. In other words, these bonds in Judge Trieber's cases were precisely one and the same as if a deposit of moneys had been required and placed in the registry of his court to reimburse all those who had paid fares beyond that which would have been reasonable or beyond rates fixed by statute. Such is Judge Trieber's opinion.

"The Supreme Court of the United States but a few weeks since (*City of Louisville* v. *Cumberland Telephone & Telegraph Co.*, 231 U. S. 652, 34 Sup. Ct. 260, 58 L. Ed. ....., January 5, 1914) was dealing with a case much like the Arkansas Rate Cases. An ordinance of the City of Louisville had been adopted fixing telephone rates. The trial court held that the rates thus fixed were confiscatory. On appeal the decree of the District Court was reversed. *Louisville* v. *Telephone Co.*, 225 U. S. 430, 32 Sup. Ct. 741, 56 L. Ed. 1151. The opinion concludes by directing 'Decree reversed without prejudice.' The

mandate required the District Court to proceed 'for further proceeding not inconsistent with the opinion of this court.' The trial court, after this mandate was filed, entered an order dismissing the case but retaining the same on the docket for the purpose of ascertaining the amounts collected by the company from its patrons in excess of the rates prescribed by the ordinance, and for the further purpose of distributing the same among the persons entitled thereto. During the progress of that case in the trial court, the city moved for an order requiring the company to pay into court all sums collected in excess of those rates fixed in the ordinance. To avoid that order and such deposit of money, the company agreed that, if the court would make no order, it (the company) would keep an accurate account of the sums collected on the rates fixed, and would on the final hearing pay the amounts into court for distribution among those entitled thereto, in the event the ordinance was not declared to be confiscatory. By reason thereof the court made no order requiring a deposit. In short, the proceedings of the trial court in the first instance was that the order for depositing the excess would not be made; the company agreeing to have the court ascertain the amount and then pay it into court for distribution. Such was part of the proceedings agreed to by both parties, and such was at the bottom of the opinion of the Supreme Court, as above cited. The trial court, after mandate was filed, proceeded to carry out this agreement, and an application for mandamus was made and denied by the Supreme Court of the United States but a few weeks since. The Supreme Court held that the trial court did not abuse its discretion on the whole record by having an accounting made in the court and requiring the amount found by the accounting to be paid into court and distributed.

"Litigation like this arose in West Virginia. The proceedings there were in the state court. The court required coupons to be issued evidencing such

excess fares thus paid. The Supreme Court of the state having held the act was constitutional, the case was affirmed by the Supreme Court of the United States in *Chesapeake & O. R. Co.* v. *Conley*, 230 U. S. 513, 33 Sup. Ct. 985, 57 L. Ed. 1579. After the mandate of the Supreme Court of the United States was filed with the Supreme Court of the state, and the Supreme Court of the state certified the proceedings to the trial court, then the trial court decided that the moneys represented by these coupons should be gathered in by the court and distributed to the holders of such coupons

"*Russell* v. *Farley*, 105 U. S. 433, 26 L. Ed. 1060, is a case strongly urged in support of the contention that this court should appoint a master and assess the amounts of excess fares and distribute them. That case presented a controversy between the receivers of a railroad in the State of Minnesota and certain other parties claiming the right to rails, and perhaps other controversies. The entire contention was with reference to a trust, and as to what property the trust had been or should be impressed. But one party appealed from the decree, and he appealed only from that portion which declared that neither party is entitled to costs or damages. The case was first presented in the state court, and, had it remained there, a Minnesota statute would have been sufficient warrant to require the state to hold that the damages could be ascertained by reference or otherwise, as the court should direct. But, the case having been removed from the state court to the United States Court, the Supreme Court held that statute was not applicable. The writer of the opinion, Mr. Justice Bradley, announces the rule to be that, where no bond or undertaking has been required, the court has no power to award damages sustained by either party in consequence of litigation, except by making such decree with reference to the costs as it may deem equitable and just. But that case is with reference to assessment of damages *between parties*

to the record, and there was no other proposition before the court. I cannot reach the conclusion that that case is an authority upon the question now before this court. Commencing 24 years ago in the case of *Milwaukee Railroad Co.* v. *Minnesota,* 134 U. S. 418, 10 Sup. Ct. 462, 702, 33 L. Ed. 970 and continuing until the present time, there has been a uniform line of holdings that the fixing of rates is a legislative act, and in determining the question of whether rates thus fixed are remunerative or not is a judicial question. The further holdings are that the only appropriate way to determine such matters is to bring into the record such officers as have the enforcement of the legislative act as part of their duties.

"In the case at bar the state officers, charged with the enforcement of the statute, were made parties defendant. For a time one individual shipper and an individual passenger were joined as defendants as supposed representatives of a class, but they were dismissed from the case, and, when these cases went to decree, the decree was only as between the railway company and the state officers. Shortly after the cases were commenced, this court, Judge Philips presiding, exacted and approved a bond of the railway company in the penal sum of $10,000. After reciting the order the bond reads:

" 'Now, if said obligor pays, in case said injunction be dissolved, all damages ascertained herein to have been sustained by the defendants or any of them, or any person becoming a defendant herein, then this obligation to be void; otherwise in force and effect.'

"There was no other bond and no other requirement. And from the date of the filing of that bond, July 22, 1905, parties on both sides acquiesced therein, and by such acquiescence neither party can say that the bond is to be construed otherwise than on its face, and courts both of law and of equity will consider the same in the language only in which it was given. The bond, it will be noticed, is to pay

damages *that the defendants or any of them, or any person becoming a defendant, may sustain.* There is not a word in the bond *with reference to shippers and passengers,* and the terms of the bond will admit of no such construction. Therefore, for several years, with the consent of all parties to the record, the case proceeded *as if there were no bond other than to reimburse the defendants to the record for such damages as they might sustain.* There is nothing for shippers and passengers to adopt by pleading said bond, and *there is nothing for the railway companies to assert against the passenger or shipper by reason of that bond.* Neither party asked that the excess rates or fares be impounded or paid into the registry of the court or controlled in any way whatsoever. So that, in my opinion, there is nothing left for consideration except a mere money demand in the nature of an action for money had and received. And it can be fairly stated that in every case where the court, sometimes on the motion of the public and sometimes on the motion of the public utility, has compelled all parties to come into court upon a state of facts showing that there was some kind of a trust to be observed and enforced, or with the property in some way or other before the court for distribution. In some instances this trust has been in the nature of a bond taken by the court for the payment of such specific damages; sometimes by the agreement of the parties; sometimes with coupons taken; and sometimes with money in the registry of the court."

An interesting case on this subject is that of *City of St. Louis* v. *St. Louis Gaslight Company,* 70 Mo. 69, where the Supreme Court of Missouri reversed the action of the trial court and dissolved the injunction. It will be observed, however, in examining the opinion in this case, that the Supreme Court required the plaintiff to do the very thing which we now insist these insurance

companies should do, and at page 121, the court, in reversing the lower court's decision, required as follows:

> "We, therefore, reverse the judgment and remand the cause, with directions to the circuit court to make a rule or order directing and requiring the receiver, appointed by the decree, *to restore to the possession of defendant the gas works and all property, real and personal, by him received in virtue of said decree, together with the profits derived therefrom;* that he report his action to said court, upon approval of which the bill shall be dismissed."

The decision of the District Court is so clear on this point that we are unable to add anything to it. The temporary injunction was denied and properly so for the reasons given.

Relator apparently relies upon the case of *State ex rel. Hyde* v. *Westhues, Judge,* 316 Mo. 457; 290 S. W. 443, for its authority for retaining excess premiums after the order allowing such collection was set aside. This case is no authority on this point. It simply holds that under an order of the court embodying the stipulation in question, these collections were made. It naturally follows that when such order was set aside the only thing appellant could do was to make restitution of everything received under such order. The lower court in this case simply held that when these insurance companies stipulated with the State, they were bound by such stipulation. Both parties followed the stipulation and great benefits were granted appellant and all other companies by reason of such stipulation. Having received the benefits of it, they are in no position to now attempt to repudiate it.

Relator contends, however, that such stipulation relates only to procedure, but the decision of Judge Stone is so analytical of this stipulation that it is difficult to add anything to it. These companies signed this stipulation and should be bound by it. It inevitably follows that the decision on this point was right and the gravest injustice would be done the State of Missouri to allow appellant to accept the fruits of this stipulation and collect more than twelve million dollars by virtue of it, and then be allowed to repudiate such stipulation and not refund such money wrongfully and illegally retained.

There is no merit to appellant's contention that as this stipulation was signed by all of these insurance companies, including appellant, they are not individually bound by it. Since when did it become the rule that two people may sign a stipulation and only one of the two is bound? Everyone signing this stipulation was bound and as appellant signed it, it makes no difference whether it signed along with other companies or by itself.

The lower court was right in requiring appellant to comply with its stipulation before asking any relief in a court of equity. This money was wrongfully collected and must be returned. Appellant stipulated to return it and has failed and refused to do so. Until it has done so, it has no right to ask relief, and the court was right in denying same.

III.

The District Court held that all of the petitions for temporary injunction should be dismissed because of the failure to fully disclose the experience of the companies. They submitted their experience on an erroneous and improper basis. The court, after condemning such method and stating that it could very well deny an application for a temporary injunction for such reason, refused to do so, on the theory that such petitions could be amended. Obviously, these petitions do not state any cause of action and no equity is contained in any of them. They failed to inform the court as to the full amount of their income and outgo. One complaining about a confiscatory rate must make full disclosure of its entire business.

No cause of action of any kind was stated in any of these petitions. Appellant states that from 1917 to 1921 inclusive its earned premiums were $2,024,736.00 and that its incurred losses and expenses were $2,330,251.00, or a loss on that method of $305,485.00.

This method of earned premiums and incurred losses on which they asked the District Court to grant an injunction was expressly condemned by every Judge of the Missouri Supreme Court, and does not state actual income or actual outgo of these companies (*Aetna Insurance Company et al.* v. *Hyde, Superintendent*, 285 S. W. l. c. 70, 71, 72).

The District Court, in a very able opinion by Stone, Circuit Judge (R. 118 to 126), so completely analyzed and destroyed the contention of appellant that we deem it unnecessary to add anything to what he said. It is unanswerable.

The petition should have been dismissed because of the failure to fully disclose income and outgo, but

in order to give appellant another chance the court relieved it stating that "ordinarily, the result from such failure would be denial of temporary injunctive relief" (R. 127).

The following cases hold that one alleging confiscation has the burden of proof to show it and that the evidence must be clear, full and convincing, and on this ground alone the District Court was fully justified in refusing to grant a temporary injunction.

The leading case in the United States on this point is *Chicago & Grand Trunk Railway Company* v. *Wellman*, 143 U. S. 339. In that case it was agreed that the operating expenses were a certain sum. In refusing to accept such agreement and holding that the duty was on the railroad to show confiscation by its own evidence, Mr. Justice Brewer, at page 345, said:

> "A single suggestion in this direction: It is agreed that the defendant's operating expenses for 1888 were $2,404,516.54. Of what do these operating expenses consist? Are they made up partially of extravagant salaries; fifty to one hundred thousand dollars to the president, and in like proportion to subordinate officers? Surely, before the courts are called upon to adjudge an act of the legislature fixing the maximum passenger rates for railroad companies to be unconstitutional, on the ground that its enforcement would prevent the stockholders from receiving any dividends on their investments, or the bondholders any interest on their loans, they should be fully advised as to what is done with the receipts and earnings of the company; for if so advised, it might clearly appear that a prudent and honest management would, within the rates perscribed, secure to the bondholders their interest, and to

the stockholders reasonable dividends. While the protection of vested rights of property is a supreme duty of the courts, it has not come to this, that the legislative power rests subservient to the discretion of any railroad corporation which may, by exorbitant and unreasonable salaries, or in some other improper way, transfer its earnings into what it is pleased to call 'operating expenses.'

"We do not mean to insinuate aught against the actual management of the affairs of this company. The silence of the record gives us no information, and we have no knowledge outside thereof, and no suspicion of wrong. Our suggestion is only to indicate how easily courts may be misled into doing grievous wrong to the public, and how careful they should be to not declare legislative acts unconstitutional upon agreed and general statements, and without the fullest disclosure of all material facts."

In this case it clearly appears and the trial court found that appellant had not made full disclosure of its income and outgo, and in holding that under such circumstances it was not entitled to any relief, the Supreme Court of Nebraska, in *State of Nebraska* v. *Adams Express Company,* 85 Neb. 25, 42 L. R. A. (N. S.) l. c. 401, said:

"In concluding the discussion of this question, it must be borne in mind that, where an attempt is made to strike down a rate statute, it is incumbent on the party complaining to make full, fair and complete disclosure. Now, while it appears from a careful reading of the evidence that in many, and perhaps most, things the defendant has made full and fair disclosure, still in some matters it has failed to do so. We find that there is a large sum charged to the intrastate business as expenses of administration. We are

told that this includes the salaries of the defendant's general officers. It appears that the company has declined to state the salary of a single one of such officers, and we are wholly without any knowledge as to the amount, much less the reasonableness, of such salaries. Under a showing of this kind the defendant could, without danger of detection or even adverse criticism, load the Nebraska state business with an expense which would render it so unremunerative as to require us to strike down the act in question. Again, it appears that the defendant is a joint-stock company, and it is fair to presume, in the absence of disclosure and proof to the contrary, that a majority of its stock is held and owned by its officers and directors. In such a case salaries could readily be made so exorbitant, unreasonable, and excessive that, by charging to the intrastate business a proportionate amount thereof, that business would appear to be unremunerative.

"Finally, the evidence shows that the amount paid to the Burlington railroad for transportation for the year 1907 was $159,727.76, or 57.5 per cent of the gross receipts from domestic business. This appears to be a larger percentage than is paid to any other railroad for like services. It may be an entirely proper charge, or it may be an unreasonable exaction, and there is no evidence in the record tending to establish either proposition. Counsel for the defendant assert that its contract with the Burlington railroad was the result of competitive bidding. This may be so, but it is not proved, and, if it were proved, would not establish *per se* the reasonableness of the charge The public is entitled to have its commodities carried at fair rates, and cannot be subjected to excessive charges by any arrangement between the railroad and the express company. If a railroad farms out the express business, it must be on terms that will enable the express carrier to operate at a profit, without imposing excessive

charges upon its patrons. Any contract which will not permit this to be done, whether it be the result of competitive bidding or not, is void in so far as it affects the rights of the public.

"For the foregoing reasons we are of opinion that the defendant has failed to show by competent evidence a fair and full disclosure that the rates in question are confiscatory, and its exceptions upon this point are therefore overruled."

Under no possible theory can appellant sustain its application for an injunction because of its refusal to fully disclose its activities. If other authorities are desired on this question, see:

Mo. Rate Cases, 230 U. S. 474, 33 Sup. Ct. Rep. l. c. 979.
Minn. Rate Cases, 230 U. S. 352, 33 Sup. Ct. Rep. 762.
Kansas City Southern Ry. Co. v. *U. S.*, 52 L. R. A. (N. S.) l. c. 51.
Company v. *Lewis*, 180 N. Y. Supp. l. c. 586.
Ark. Rate Cases, 187 Fed. 290.
State v. *Virginia & T. R. Co., et al.*, 24 Nev. 53, 49 Pac. 945.
Smythe v. *Ames*, 169 U. S. 466, 18 Sup. Ct. Rep. 418.
Union Pacific R. R. Co. v. *U. S.*, 99 U. S. 402.
Consolidated Gas Co. v. *N. Y.*, 157 Fed. 849.
Cedar Rapids Gaslite Co. v. *Cedar Rapids*, 144 Iowa 426, 48 L. R. A. (N. S.) 1025.
Galveston Electric Co. v. *Galveston*, 258 U. S. 388, 42 Sup. Ct. Rep. l. c. 356.
Company v. *Nixon*, 181 N. Y. Supp. 623.
Re North Adams, 27 Mass. G. & E. L. C. R. 17.
Legg v. *Company*, 1 Calif. R. C. R. 11.
In re Freight Rate, 9 I. C. R. 382.
Ill. Cent. R. R. Co. v. *Interstate Commerce Com.*, 206 U. S. 441, 27 Sup. Ct. Rep. 700.

Darnell v. *Edwards*, 244 U. S. 564, 37 Sup. Ct. Rep. 702.
State ex rel. v. *Public Service Commission*, 252 S. W. l. c. 452.
10 C. J. 411, 12, 13, 18.
10 Fletcher Cyc. Cor., pp. 747, 748.

This method of earned premiums and incurred losses, on which the court was called upon to grant an injunction, was expressly condemned by every judge of the Missouri Supreme Court, and does not state the actual income or the actual outgo of these companies. Judge Ragland, after demolishing this method in the same case between these parties, *Aetna Insurance Company, et al.*, v. *Hyde, Superintendent*, 285 S. W. at page 71 said:

> "The stand now taken by them has the appearance, therefore, of having been contrived by ingenious counsel, or by possibly more ingenious insurance accountants, for the purposes of this case."

What we contend is this: That in asking this court for an injunction, it was the duty of these insurance companies to fully and completely disclose to this court all of their income and all of their outgo. This they have not done and this court can not grant them any relief. We are not going, at this time, to enter into a discussion of the earned premium basis and the premium received basis, because the Missouri opinion is so full and complete that we are unable to add anything to it. This court will have no trouble, after reading that opinion, in finding that this method now presented to this court, of earned premiums, was invented for this

charges upon its patrons. Any contract which will not permit this to be done, whether it be the result of competitive bidding or not, is void in so far as it affects the rights of the public.

"For the foregoing reasons we are of opinion that the defendant has failed to show by competent evidence a fair and full disclosure that the rates in question are confiscatory, and its exceptions upon this point are therefore overruled."

Under no possible theory can appellant sustain its application for an injunction because of its refusal to fully disclose its activities. If other authorities are desired on this question, see:

Mo. Rate Cases, 230 U. S. 474, 33 Sup. Ct. Rep. l. c. 979.

Minn. Rate Cases, 230 U. S. 352, 33 Sup. Ct. Rep. 762.

Kansas City Southern Ry. Co. v. *U. S.*, 52 L. R. A. (N. S.) l. c. 51.

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lawsuit, as far as Missouri is concerned, and is absolutely indefensible, erroneous and false. Not having submitted their true experience, of course they cannot expect an injunction. They studiously refrain from telling the court their true experience, and cannot expect a court of equity to grant them any relief.

Judge Ragland further says that for a period of twenty years "the companies, according to the method of computing earnings which they now invoke, had during all of that time made an underwriting profit of less than one per cent," and yet the record shows they paid enormous dividends to their stockholders and their earnings were greater by far than the earnings of any other corporations in America. They settled with their stockholders and paid dividends on the true basis, but they attempt to invoke an utterly falacious method in dealing with the State regarding rates.

In utterly destroying this method now urged before this court and in showing that it is a false method, Judge White in the Aetna case, *supra,* at page 70, said:

> "Was any business ever so generally prosperous? The plaintiffs, by this showing, every 5 years can quadruple their original investment, or double their total accumulations, and at the same time pay as dividends 10 per cent per annum. Three-fourths of this is due to the underwriting business, as they count it, notwithstanding the enormous losses in that branch of the business in Missouri. Yet, as we will show, more than half of the stated investment earnings are directly due to the underwriting business. Are we to believe that rates are so much higher in other States than here, notwithstanding many of them have rating acts, that this enormous profit can thus be accounted

for? The evidence does not show any such condition. On the contrary, by the method of ascertaining profits and losses, which the respondents seek to apply to this case, the companies during the last 20 years have made an underwriting profit of less than one per cent. This in the teeth of the undisputed figures that the underwriting profit has resulted in the enormous gains shown above. Thus the, to us, unexplored mysteries of bookkeeping present the problems to be solved."

And, in finally disposing of this "earned premium" method, as now presented to this court, Judge White, in the Aetna case, *supra,* at page 72 said:

"The referee, in holding with the plaintiffs in that matter, says that method of arriving at the earnings is not satisfactory. It is not only unsatisfactory; it is utterly indefensible. Any method which makes an asset a liability, turns a profit into a loss, shows a profitable business to be a losing business, and writes enormous gains for a long period off the books, cannot be correct on any principle."

In this same experience which this court is asked again to litigate, in the Aetna case, *supra,* page 78, the Missouri Supreme Court found that these companies had earned forty per cent more than an eight per cent profit, and in so holding, said:

"As stated above, a reasonable profit is 5 per cent on the business done, premiums received, and 3 per cent additional for conflagration hazard, or 8 per cent, which would be $6,680,169 for the test period. Therefore, $8,681,964 was an unreasonable profit, and justified a reduction under the circumstances shown. With the war tax eliminated, it would have been $9,310,087, about 40 per cent more than what was conceded to be a reasonable profit."

Appellant apparently stands in this court with only one case to support its contention that the proper method of figuring profit and loss is premiums earned, losses and expenses incurred, as distinguished from the method of premiums paid, losses and expenses paid. That case is *Sun Insurance Office, Appellant,* v. *Clark, Respondent.* (Appeal Cases, Law Reports 1912, p. 443.) This court will observe that was a tax case rather than a rate case. The Missouri opinion so clearly points out the difference between these cases that it hardly seems necessary to further discuss such difference, and this court should know that in a rate case in Kansas, *Aetna Insurance Company, et al.,* v. *Travis, State Superintendent of Insurance,* 259 Pacific 1068, appellant and all other fire insurance companies doing business in Kansas and Missouri abandoned the Sun case, *supra,* and in speaking of such abandonment, the Supreme Court of Kansas, at page 1076, said:

> "It is worthy of note that plaintiffs, since the filing of the former opinion, no longer contend that *Sun Ins. Office* v. *Clark,* (1912) A. C. 443, supports their contention that in computing profits of an insurance company unearned premium should be disregarded; it seems clear that what was decided in that case had been misinterpreted. It is contended, however, that the Bullion Case (*Bullion* v. *Aetna Insurance Co., supra*) is an authority for such holding. As previously noted, this case turned on the interpreting of the state statute. The court even took evidence of the author of the bill and of the ideas he had in mind as to the meaning of the language used, and followed what it found to be the legislative intent. The statute differs from ours. The case is neither controlling nor persuasive here."

It will be observed that the court also distinguished the Bullion case relied upon by appellant, because of a peculiar statute of Arkansas allowing insurance companies a profit upon their underwriting experience. Neither the statutes of Missouri nor Kansas allow any such profit, but simply allow an aggregate profit upon the entire business done.

It is interesting to note in the Kansas case, *supra*, that interest earnings on unearned premiums are figured as a part of the income of a fire insurance company, and also earnings on apportioned capital and surplus. The Missouri Supreme Court decision allows interest earnings on unearned premiums, but the question on the earnings on apportioned capital and surplus was not discussed. It appears to us that the Kansas and Missouri decisions are so clear in showing that interest earnings on unearned premiums should be allowed that we invite a careful reading of these decisions on this point because the lower court in this case refused to allow such earnings. Instead of presenting the matter further we adopt the argument on these points as set out in these two opinions.

It would be impossible for any fire insurance company to show a profit on the erroneous basis now advocated by appellant. The testimony in the Missouri case shows that on this erroneous method fire insurance companies throughout the United States in the past twenty-five years have not earned one-half of 1 per cent profit, and to allow them an 8 per cent profit on such erroneous method would result in fire insurance rates being increased to such an extent that no one could afford to

carry insurance. Such method is fallacious and unsound and we feel unable to add anything to the able opinion cited in support of our contention that the proper method is premiums paid, losses and expenses paid. The matter of reserves is not involved at all. The companies can set up a reserve under either method. In fact a larger reserve can be set up under the method of premiums paid because there will be more money available. This is likewise fully discussed in the Missouri opinion, and this court will have no difficulty in arriving at the conclusion that the method contended for by the State does not in any sense affect reserves or prevent a company from setting up a reserve.

The testimony of this appellant in the Missouri case shows that prior to the institution of this lawsuit appellant never contended that the proper method of figuring profit and loss was on the earned basis. To the contrary it was shown practically without question that every report filed with the Insurance Department since the Rating Act of Missouri became effective in 1915, relating to Missouri business, was on the basis of premiums paid, losses and expenses paid. Appellant and all other companies secured three increases in fire insurance rates in Missouri during this period, and such increases were granted on their application on the basis of premiums paid, losses and expenses paid. Having made their reports to Missouri on this basis and having secured three increases on this basis, the court naturally refused to take them seriously when they attempted to invoke another basis when resisting a 10 per cent reduction order. In 1920 appellant and all other fire insur-

ance companies were granted a 15 per cent increase on the basis now contended for by the State.

Obviously an injunction should not have been granted in this case, for many reasons:

(a) Because no equity is stated in these petitions.

(b) Because this matter has been fully and completely adjudicated and determined between these same parties in a court of their own choosing.

(c) Because these parties stipulated that if they were allowed to retain these excess premiums they would return them to the policyholders of Missouri in case the reduction order was upheld.

(d) Because these companies are not offering to do equity. They are attempting to retain more than $12,000,000 which does not belong to them and should offer restitution before asking any relief from a court of equity.

Much more could be said against these petitions of these plaintiffs. But it is so clear that they are not entitled to any relief that we leave the matter with the court, confident as we are that under no possible theory of this case can any equitable relief be granted them.

IV.

All of the fire insurance companies in Missouri, including appellant, selected their own forum and proceeded to seek a joint review through the state courts as to the validity of the 10 per cent reduction order; the decision of the Missouri Supreme Court sustaining such reduction was undisturbed by the Supreme Court of the United States; the decision of the three-judge court in refusing a temporary injunction to again litigate such reduction was proper as the matter was then res adjudicata on all questions presented.

While the decision appealed from does not expressly hold that appellant cannot again litigate the confiscatory nature of this 10 per cent reduction order, it does say

that since the decision of the Missouri Supreme Court sustaining such reduction was undisturbed by the Supreme Court of the United States, the matter is at an end (R. 105). The court could do nothing but refuse a temporary injunction because the rule is well settled that when a carrier has litigated the confiscatory nature of a reduction order and such reduction order has been upheld by a court of last resort, the matter is ended as to the past effect of such reduction. If such carrier desires to litigate the future effect of such reduction, it may do so, but all matters up to the date of the final decision are concluded and cannot again be inquired into.

On this point the District Court said (R. 105):

> "The fourth purpose became active because the final determination was against the companies. The State Supreme Court upheld the order of reduction and the Supreme Court of the United States declined to interfere. The judgment of the State Supreme Court has become final. Nothing remains to be done by anyone, under the stipulation, except for the companies to repay the 10% excess of premiums collected to those from whom they were collected. One of the expressed purposes of the present complaints is to prevent this repayment.
>
> "This being the situation at the time these complaints were filed, at the hearing and at present, are the defendants justified in asking that this court grant no relief until complainants have performed their remaining part under the stipulation and repaid these excess premiums collected?"

These insurance companies proceeded through the Circuit Court of Cole County, the Supreme Court of Missouri and on to the Supreme Court of the United States. The decision of the Missouri Supreme Court,

which was against them, was undisturbed by the Supreme Court of the United States and questions there involved can never again be litigated. The sole question in that case was whether or not the ten per cent reduction order of October 9, 1922, was confiscatory. The Supreme Court of Missouri held it was not, and these companies cannot again litigate that question, as to that past experience.

They selected their own forum and their own remedy, and having lost, there is nothing for them to do but to now make restitution.

Exactly the same situation arose in *Detroit & M. R. Co.* v. *Michigan Railroad Commission, et al.*, 203 Fed. 864. Certain shippers, alleging that an order of the commission was unreasonable and confiscatory, proceeded through the state courts, as did these insurance companies, and the Supreme Court of Michigan sustained the rates. Thereupon, these companies applied to three judges of the Federal Court for an injunction against the enforcement of the rates, exactly as here, and in a *per curiam* opinion, the District Court refused the injunction and in so doing, in the last paragraph of its opinion, at page 871, said:

> "It follows that the right of the railway company to such a review as any court could give became fixed when the order of the Commission was promulgated; that, to prevent an invasion of its legal right, the railway company could resort to any court of competent jurisdiction; and that, having selected the Wayne Circuit Court in Chancery, and having submitted its controversy to that court, and judgment having been rendered against complainant by that court and by the Supreme Court of Michigan, the railway company cannot now try the same controversy over again in this court."

Thereafter, these railroads carried the case to the Supreme Court of the United States, *Detroit & Mackinac Ry.* v. *Mich. Railroad Commission,* 235 U. S. 402. Mr. Justice Holmes, in declaring what the decision below was, at page 404, said:

> "The ground of the decision below was that the petitioner was concluded by the judgment of the Michigan court; and, of course, if the matter properly can be said to be *res judicata,* there is an end of the case."

Finally at page 406, in holding that the matter was *res judicata* and could never again be inquired into, the court said:

> "The distinction between the judicial function of declaring a rate unreasonable and the legislative one of establishing a rate as reasonable developed in *Louisville & Nashville R. R.* v. *Garrett,* 231 U. S. 298; *San Diego Land & Town Co.* v. *Jasper,* 189 U. S. 439, 440; *Janvrin, Petitioner,* 174 Massachusetts, 514. And in *Bacon* v. *Rutland R. R. Co.,* 232 U. S. 134, it was held that statutory provisions very like those of Michigan under a constitution that in like manner separated legislative, executive and judicial powers, gave only the last to the courts. Of course, when once it is established that the bill in the state court was an ordinary though statutory judicial proceeding, we must assume that the plaintiff was bound to present its whole case. *Calaf* v. *Calaf,* 232 U. S. 371, 374. Whether the Commission exceeded its jurisdiction or not, as it purported to make orders the Michigan court had jurisdiction and the appellant is bound by its decree."

An attempt was made to distinguish this case by these insurance companies on the sole ground that having proceeded jointly through the Missouri courts,

their experience was never considered separately by the Federal Court, and that, therefore, their constitutional rights have never been passed upon. However, they submitted their individual experiences in the Missouri case, and later aggregated the amount of premiums in order to show their total collections. Mr. Justice Butler (48 Sup. Ct. Rep. 174) did not in any way suggest that this question could be litigated now by separate companies. They attempt to read this in his opinion but it is not there. If he did intimate any such things, of course he was referring to the future effect of this reduction, and not to the past, as the Supreme Court of the United States has always held that when a carrier has litigated the confiscatory nature of a rate with a public body and lost, that the matter is at an end up to the final decree of the Supreme Court of the United States, and it should not take any citation of authorities to show that these companies, having of their own volition litigated this matter in their own way, and in the forum selected by them, cannot now relitigate the matter.

This was definitely and positively settled by the Supreme Court of the United States in the case of *State of Missouri* v. *Chicago, Burlington & Quincy Railroad Co.*, 241 U. S. 533. It appears in that case that the different railroads in Missouri secured an injunction in the Federal Court for the Western District of Missouri against the maximum freight rate law and the two cent passenger law, and that after a permanent injunction had been granted against such laws, the State of Missouri appealed to the Supreme Court of the United

States, and that court held that the railroads had failed to show that such reduced rates were confiscatory and reversed and remanded the judgment of the District Court with directions to dismiss the bill without prejudice. After that, the State of Missouri filed a suit direct to the Supreme Court of the United States against the Burlington Railroad for excess rates paid it during such litigation. The railroads filed an answer setting up, again, confiscation, taking the position that the order directing the dismissal of the bill "without prejudice" allowed them to again litigate the matter of confiscation, but Mr. Chief Justice White, at page 539, decided against this contention and held that the matter was *res adjudicata* and could never be again inquired into, and in so holding said:

> "Resulting from the principles just stated, recognizing that the operation of a decree enjoining the giving effect to a rate law because of its alleged confiscatory character differed materially both as to the public interest and that of the railroad from the consequences which would arise from a mere decree rejecting the complaint of a person as to an individual and consummated grievance based on the claim that an illegal rate had been charged, it came to pass that a form of decree came to be applied in rate cases to meet and provide for this difference. In other words, in a rate case where an assertion of confiscation was not upheld because of the weakness of the facts supporting it, the practice came to be that the decree rejecting the claim and giving effect to the statute was, where it was deemed the situation justified it, qualified as 'without prejudice,' not to leave open the controversy as to the period with which the decree dealt *and which it concluded,* but in order not to prejudice rights of property *in the future* if from future operation and changed condi-

tions arising in such future it resulted that there was confiscation. And the same limitation arising from a solicitude not to unduly restrain in the future the operation of the law came to be applied where the asserted confiscation was held to be established. In other words, the decree enjoining the enforcement of the statute in that case was also qualified as without prejudice to the enforcement of the statute *in the future* if a change in conditions arose. The doctrine in the first aspect nowhere finds a more lucid statement than the one made on behalf of the court by Mr. Justice Moody in *Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1. It has since been repeatedly applied in language which in the completest way makes the meaning of the limitation without prejudice in such a case clear and leaves no ground for any dispute whatever on the subject. *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19; *Northern Pacific Ry.* v. *North Dakota*, 216 U. S. 579; *Louisville* v. *Cumberland Tel. & Tel. Co.*, 225 U. S. 430; Missouri Rates Cases, 230 U. S. 474; *Des Moines Gas Co.* v. *Des Moines*, 238 U. S. 153. A complete illustration of the operation of the qualification is afforded by the North Dakota case, just cited, since in that case as a result of the qualification 'without prejudice' the case was subsequently reopened and upon a consideration of new conditions arising in such *future period* a different result followed from that which had been previously reached. *Nor. Pac. Ry.* v. *North Dakota*, 236 U. S. 585. As to the second aspect, that is the significance of the limitation without prejudice as applied to a decree which enjoined the rates as confiscatory, the meaning of the reservation as we have stated it was in express terms through an abundance of precaution defined and stated in the opinion in the Missouri Rate Cases, 230 U. S. 474, 508."

And at page 541, in holding that after an adjudication that a rate was not confiscatory, only future matters may be litigated, said:

> "But this contention again disregards the doctrine upon which, as we have pointed out, the reservation in rate-making cases came to be applied. In other words, it treats the reservation without prejudice as looking backward and overthrowing that which was concluded by the decree instead of considering it in its true light, that is, as looking forward *to the future* and providing for conditions which might then arise."

And at page 542, in holding that the decree was binding on the railroads there, and the insurance companies here, regardless of its effect upon shippers or policyholders, said:

> "This being true, it is obvious that the question here is not how far the decree relied upon was binding upon parties who were not technical defendants, but how far is it binding upon the railroad."

The same situation as here arose in *Puget Sound Electric Railway* v. *Lee, et al.*, 207 Fed. 860. There railroads litigated the confiscatory nature of a rate to the Supreme Court of Washington. After having lost there, they went into the Federal Court and attempted to relitigate the matter, as these insurance companies are doing here. In refusing to allow them to do so, the court, at page 865, said:

> "The matters alleged as having arisen since the submission to the Washington court are not sufficient to give this court jurisdiction. We repeat the language of the District Court of Michigan. The complainant having selected its forum,

having submitted its controversy to the Washington State court, and judgment having been rendered against it by that court and the Supreme Court of Washington, cannot now try the same controversy over again in this court."

In holding that a matter once litigated could never be litigated again, even though all matters were not offered in evidence, and even though all rights of recovery were not asserted, the Supreme Court of the United States in *Baltimore Steamship Company, et al.* v. *Phillips,* 274 U. S. l. c. 321, said:

"A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action. 'The facts are merely the means, and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear. "The thing, therefore, which in contemplation of law as its cause, becomes a ground for action, is not the group of facts alleged in the declaration, bill or indictment, *but the result of these in a legal wrong, the existence of which, if true, they conclusively evidence.*" ' *Chobanian* v. *Washburn Wire Company,* 33 R. I. 289, 302.

"The injured respondent was bound to set forth in his first action for damages every ground of negligence which he claimed to exist and upon which he relied, and cannot be permitted, as was attempted here, to rely upon them by piecemeal in successive actions to recover for the same wrong and injury. *Columb* v. *Webster Mfg. Co.,* 84 F. 592;

Cincinnati, N. O. & T. P. Ry. Co. v. *Gray,* 101 F. 623, 631; *Smith* v. *Missouri Pac. Ry. Co.* 56 F. 458; *Payne* v. *N. Y. S. & W. R. R. Co.,* 201 N. Y. 436, 440; *Chobanian* v. *Washburn Wire Company, supra,* pp. 300-304; *Senn* v. *Southern Ry. Co.,* 135 Mo. 512, 519; *Munro* v. *Railroad,* 155 Mo. App. 710; 727; *Schweinfurth* v. *Railway Co.,* 60 Oh. St. 215, 230-231; *Berube* v. *Horton,* 199 Mass. 421, 425-426. Many other cases are to the same effect. In the case last cited there was a declaration in an action for personal injuries containing a count at common law alleging failure to provide a reasonably safe place, and a count under the Employers Liability Act alleging a defect in the ways, works, or machinery. To this declaration, after the expiration of the period of the statute of limitations, an amendment was allowed alleging negligence of the defendant's superintendent as the cause of the same accident. The Massachusetts Supreme Court held that the statute of limitations could not be invoked because the amendment did not state a new cause of action, that cause of action being 'the injury under the circumstances under which it took place.' "

And in holding that it was the object sought rather than the method followed that would control and that where these insurance companies attempted to set aside this reduction order, for any reason, and the court refused to do so, that the matter was at an end, and could not again be litigated, the same court, in *Fugurul* v. *Rivera,* 232 U. S. l. c. 374, said:

> "In the former suit the appellants alleged the same descent, but instead of alleging express and solemn recognition of Ramon by Salvador as his natural son, sought to have him declared such and therefore entitled to inherit one-half of Salvador's estate. Its immediate object was to establish filiation by a judgment while the imme-

diate object here is to nullify a will. The theory put forward was so far different, that unless the complaint in this case had been interpreted as alleging a recognition in solemn form it would have been held bad on its face. In the former suit also the mother was alleged to have been a slave. *But these differing allegations are simply different means to reach the same result;* the possession by Ramon of the rights of a natural son; and the evidence offered in this case like the allegations in the former one was only of private acts. In these circumstances the true principle has been declared by this court to be that a judgment or decree bars all grounds for relief sought. *Northern Pacific Ry. Co.* v. *Slaght,* 205 U. S. 122, 130, 131. *United States* v. *California & Oregon Land Co.,* 192 U. S. 355, 358."

These insurance companies said that they made a mistake in proceeding through the state courts jointly, but that they should have proceeded separately, and Stone, Circuit Judge of this Circuit, in *Smith* v. *Apple,* 6 Fed. (2d) l. c. 563, in holding that where a party proceeds of his own volition but improperly so, that he is not in a position thereafter to ask relief from a court of equity, said:

"If the pendency of the suit had been presented to the Kansas Court and that court had failed to protect Smith in that regard, there would be much strength in his present contention; but when a party has a defense which he could have interposed, and is not prevented from so doing by fraud, accident or mistake, he cannot reserve that defense to some other time or forum and thus split up litigation. If he suffers through his negligent failure to interpose the defense at the proper time and in the proper court, it is from his own fault and he cannot ask relief therefrom *in a court of equity.*"

Judge Sanborn of this circuit announced the same rule in a very able opinion in *Pierce* v. *National Bank of Commerce in St. Louis*, 268 Fed. l. c. 495:

> "First. Where the second suit is upon the same cause of action and between the same parties as the first, the judgment in the former is conclusive in the latter as to every question and issue which was or might have been presented and determined in the first suit. *Harrison* v. *Remington Paper Co.*, 140 Fed. 385, 400, 72 C. C. A. 405, 420, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314; Id. 199 U. S. 607, 26 Sup. Ct. 747, 50 L. Ed. 331; *Southern Pacific Ry.* v. *United States*, 168 U. S. 1, 48, 18 Sup. Ct. 18, 42 L. Ed. 355; *Linton* v. *National Life Ins. Co.*, 104 Fed. 584, 587, 44 C. C. A. 54, 57."

It was not necessary that the court deny a temporary injunction to appellant on the sole ground that the stipulation was violated because, under all of the authorities in America, it was the duty of appellant to first make restitution of all it had received by way of excess premiums before applying to a court for an injunction. Appellant lost its suit to have such reduction order declared invalid. It was then in no position to apply for a temporary injunction until it had made restitution. There is no exception to this rule. Therefore, the court properly held that (a) no injunction should be granted until the stipulation was complied with and restitution made; (b) that in view of the fact that appellant had lost its suit wherein it alleged such reduction was confiscatory, appellant should make restitution of all received in violation of law before asking any other relief.

In all of the litigation between the state and these insurance companies only one thing was sought by them and that was the setting aside of the 10 per cent reduction order. No matter how they proceeded or what evidence they offered that was their object. They practically said that, having made a mistake in litigating the matter jointly, and the Supreme Court of Missouri having found against them in all issues involved (Aetna Insurance Co. *et al.* 285 S. W. 65), they could then go into a Federal Court and each of the companies bring a separate suit and again litigate their experience for the same period. Obviously, if this were true, when there is both a joint and a separate cause of action, litigants might join and each losing, might proceed to litigate the same matter. They had their day in court and the decision of the Missouri Supreme Court and the Supreme Court of the United States was against them. As the experience in the past was closed by these decisions, there is nothing for them to do but to make restitution, as held by the District Court. While very little discussion may be found in Judge Stone's opinion regarding *res adjudicata,* the authorities are so clear that this court will have no difficulty in holding that nothing remains to be done in this seven years litigation except to repay to the policyholders of Missouri the sum of money due them, which was wrongfully collected under an order of the Circuit Court of Cole County and which has since been set aside.

V.

While the decision of the three-judge court is not conclusive on this court, yet great deference will be paid to its finding, and where the decision was justified by both the law and the facts, as in this case, this court will not disturb same.

The three-judge court refused a temporary injunction to appellant and 113 other fire insurance companies doing business in Missouri because such companies were attempting to violate a solemn stipulation which they had entered into with the State of Missouri. Such court stated that it was justified in refusing such injunction because the petitions did not state sufficient facts to constitute a cause of action in that the method of calculating a profit or loss was erroneously stated. In holding that the Supreme Court of the United States will not interfere with such holding, Mr. Chief Justice Taft, in *Chicago Great Western Railway Company* v. *Kendall, Governor of the State of Iowa, et al.*, 266 U. S. l. c. 100, said:

> "It would take a very clear case upon the record to justify this court in setting aside the conclusion of a court of three judges under Section 266 upon what is solely a question of fact and an exercise of sound judicial discretion as to the just balance of convenience in granting or withholding a temporary suspension of the operation of a state law in the collection of taxes."

Appellant and all other fire insurance companies resisted the 10 per cent reduction order, effective November 15th, 1922, by proceeding through the State Circuit Court and on to the Supreme Court of Missouri. The decision there was against them. (*Aetna*

Insurance Company v. *Hyde*, 315 Mo. 13; 285 S. W. 65.) This court in *Aetna Insurance Company* v. *Hyde*, 275 U. S. 440, refused to disturb the judgment of the Missouri Supreme Court sustaining such reduction order, and appellant was one of the plaintiffs in that suit in this court. Thereafter appellant filed this suit asking for an injunction against the same reduction order and a three-judge court denied a temporary injunction for the following reasons:

(a) Because appellant had stipulated that in case such reduction order was upheld, it would refund all excess premiums collected, and it had failed to do so (R. 108, 109).

(b) Because the judgment of the State Supreme Court had become final and the same experience could not again be litigated (R. 105).

(c) Because the burden of proving confiscation was not met by appellant because it had not fully disclosed its income and outgo (R. 127).

The rule is universal in this court that great deference will be paid to the finding of a three-judge court, and in holding that under these circumstances this court will not interfere with the decision of the lower court, Mr. Justice Stone, in *United Fuel Gas Company* v. *Public Service Commission of West Virginia, et al.*, 278 U. S. l. c. 326, said:

> "An order of a court of three judges denying an interlocutory injunction will not be disturbed on appeal unless plainly the result of an improvident exercise of judicial discretion. *Chicago Great Western Ry.* v. *Kendall*, 266 U. S. 94, 100; and see *Meccano, Ltd.* v. *Wanamaker*, 253 U. S. 136, 141.

> To support the burden resting upon it, appellant, while challenging generally the correctness of the court's valuation, places its chief reliance on the alleged erroneous valuation of its gas field. To support the claim to a much higher valuation, it relies upon the same theories and the same method of ascertaining the value of the gas field as were pressed upon us in No. 1 (*ante,* p. 300). With respect to this item, after making the same assumptions as in that case, we reach the same conclusion. for reasons there stated at length, that there is no dependable evidence of value of appellant's gas field in excess of the value assumed on its books; that no ground is presented for assigning to it a value beyond the $6,343,329 so assumed on appellant's books, a smaller value than that used by the court in its calculations."

The United Fuel Gas Company case, *supra,* is identical with this case. There they had failed to prove confiscation or offer any credible testimony which would justify a court in finding in their favor. The same situation exists here. Appellant failed and refused to inform the court as to its income and outgo. The court could do nothing but deny a temporary injunction and under the authorities of this court such refusal was proper.

There were many reasons why a temporary injunction should not have been granted and this court will be able to sustain the three-judge court on many grounds. In stating the rule that this court would ordinarily not interfere with the discretion of the trial court in refusing or granting a temporary injunction, Mr. Justice McReynolds, in *Meccano, Ltd.,* v. *John Wanamaker, New York,* 253 U. S. l. c. 141, said:

"The correct general doctrine is that whether a preliminary injunction shall be awarded rests in sound discretion of the trial court. Upon appeal, an order granting or denying such an injunction will not be disturbed unless contrary to some rule of equity, or the result of improvident exercise of judicial discretion. *Rahley* v. *Columbia Phonograph Co.*, 122 Fed. Rep. 623; *Texas Traction Co.* v. *Barron G. Collier, Inc.*, 195 Fed. Rep. 65, 66; *Southern Express Co.* v. *Long*, 202 Fed. Rep. 462; *City of Amarillo* v. *Southwestern Telegraph & Telephone Co.*, 253 Fed. Rep. 638. The informed judgment of the Circuit Court of Appeals exercised upon a view of all relevant circumstances is entitled to great weight. And, except for strong reasons, this court will not interfere with its action. No such reasons are presented by the present record."

Obviously, this court will not interfere with the decision of the three-judge court in this case because there was nothing presented to justify a temporary injunction. Appellant litigated this question clear to the Supreme Court of the United States and the decision was against it. To now allow it to litigate this question again will open the door to every litigant and allow a reconsideration of every question. There must be an end to all things and this seven years of litigation should now end. Appellant has had every opportunity to prove this reduction order confiscatory and has failed to do so.

VI.

The Missouri Fire Insurance Rating Act is constitutional. Fire insurance is a business affected with a public interest and it is well settled that a state may regulate fire insurance rates.

Prior to 1915, fire insurance companies in Missouri conducted their business under the Anti Trust Laws.

That year the fire insurance rating act was passed and these insurance companies now assert that it is unconstitutional. Yet it is similar to practically all of the rating acts in America and these have been upheld time and time again and we are unable to appreciate the force and effect of the assault upon this act.

Mr. Chief Justice Taft, in announcing the rule that fire insurance rates might be regulated, in *National Union Fire Insurance Company* v. *Wanberg*, 260 U. S. l. c. 73, said:

> "The decision of this court in *German Alliance Insurance Co.* v. *Lewis*, 233 U. S. 389, settled the right of a state legislature to regulate the conduct by corporations, domestic and foreign, of insurance as a business affected with a public interest."

The first time this question came before the Supreme Court of the United States, construing rating acts, was in the well considered case of *German Alliance Insurance Company* v. *Lewis*, 233 U. S. 389, 34 Sup. Ct. Rep. 612; L. R. A. 1915, 1189. And in sustaining the Rating Act of Kansas, the court said:

> "A *business* may be so far affected with a public interest as to permit legislative regulation of its rates and charges, although no public trust is imposed upon property, and although the public may not have a legal right to demand and receive service. *The business of fire insurance is so far affected with a public interest as to justify legislative regulation of its rates.*"

And in holding that the business of fire insurance is subject to regulation, the Supreme Court of Oklahoma, in *Insurance Company of North America, et al.*

v. *Welch, Ins. Com'r et al.*, 49 Okla. 620, 154 Pac. l. c. 50, said:

> "In recent years the business of insurance has grown to such an extent that its ramifications extend to practically every phase of business in the commercial world, and the necessity for regulation of the business has become more and more apparent, until legislation having that purpose was enacted and brought into review before the courts, with the result that the right of the state to regulate the same has been finally determined."

In *State ex rel. Waterworth* v. *Harty, Superintendent*, 278 Mo. 685, the Supreme Court of Missouri sustained the Missouri Rating Act and held that the review therein provided was judicial, and in so holding, at page 692, said:

> "The power to regulate insurance rates arises out of the same considerations which give origin to the power to regulate other rates, i. e. the business is affected or 'clothed' with a public interest (*German Alliance Ins. Co.* v. *Kansas, supra*). *The* power to regulate rates, called into existence by the presence of a public interest, falls within the police power of the state and is purely legislative in character (*State ex rel.* v. *Public Service Comm.*, 204 S. W. 497; *Interstate Comm.* v. *Railway*, 167 U. S. l. c. 499, 500, and cases cited). It is not contended legislative powers can be delegated to or exercised by the courts. The constitutional provision above set forth expressly prohibits it. It *is* insisted that this proceeding involves no violation of the constitutional principle. By the statute under which this suit is brought it is explicitly provided, among other things, that 'rates shall not be raised' until prescribed notice has been given to the Superintendent 'and his approval obtained.' Obviously, the proposed rates are not yet existing and cannot,

under the act, become rates at all until the Superintendent's approval has been secured. The approval of the Superintendent is essential to the transformation of the *proposed* rates into *existing* rates. This approval is the final act in the process of making increased fire insurance rates. This final act in the process of rate making this court asked to *compel* the Superintendent to perform. 'A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is a making of a rule for the future, and, therefore, is an act legislative, not judicial in kind.' "

In this same case, between these same parties, *Aetna Insurance Company et al.* v. *Hyde, Superintendent,* 315 Mo. 13, 285 S. W. 65, the Missouri Rating Act was construed and upheld.

If other authorities are needed on this point, we invite a reading of the following cases:

Henderson v. *McWaters,* 104 S. C. 268.
Martin v. *Howard,* 96 Neb. 278, 147 N. W. 689.
Company v. *Barnes,* 189 Fed. 769.
Company v. *Railroad,* 77 N. H. 6, 45 L. R. A. (N. S.) 845.
People v. *Company,* 126 Ill. App. 636.
12 C. J. 850.

If the court is interested in the different rating acts in the United States, we cite them:

Arkansas: Ark. Digest, Section 5962.
Colorado: Compiled Laws of 1921, page 843.
Idaho: Session Laws of 1923, page 53.
Indiana: Laws of 1919, page 512.

Kansas: R. S. Kansas 1923, page 636.
Kentucky: Carroll's Kentucky Statutes 1922, page 762 B-33.
Michigan: Public Acts of Michigan 1923, page 25.
Minnesota: Laws of Minn. 1915, page 135.
Mississippi: Laws of Miss. 1924, Chapter 188, Sec. 10.
Missouri: R. S. Missouri 1919, Section 6283.
New Jersey: Compiled Statutes of N. J. 1915, page 816.
New York: Laws of N. Y. 1923, pp. 691-693.
Ohio: Laws of Ohio 1917, page 745.
Oklahoma: Session Laws of Oklahoma 1915, page 341.
Oregon: Laws of Oregon 1917, page 358.
Pennsylvania: Laws of Pa. 1921, page 743.
South Carolina: Laws of S. C. 1916, page 675.
South Dakota: Session Laws of S. D. 1919, page 239.
Tennessee: Public Acts of Tenn. 1919, page 70.
Texas: Texas Statutes 1920, page 776.
Vermont: Laws of Vermont, 1919, page 158.
Virginia: Laws of Virginia, 1920, page 238.
Washington: Pierce's Washington Code 1919, Vol. 1, page 2981.
West Virginia: Laws of West Virginia 1920-1921, page 565.
Wisconsin: Laws of Wisconsin, 1917, page 166.
Wyoming: Laws of Wyoming, 1921, page 226.

Many of these acts are exactly similar to that of Missouri. Others provide for an underwriting profit while Missouri provides for a reasonable profit. However, those rating acts expressly authorizing the regulation of rates are: Arkansas, Colorado, Kansas, Kentucky, Minnesota, Mississippi, New York, Oklahoma, Oregon, South Carolina, Texas, Vermont, Virginia, Wisconsin and Wyoming.

So far as we have been able to ascertain no court has declared any of these rating acts unconstitutional. They have been sustained time and time again as we have pointed out under this point, and we do not believe there is any merit at all in the assault against the Missouri Rating Act as made by these insurance companies at this time.

The Supreme Court of Kansas upheld a reduction order of that state similar to this one. The opinion is a very interesting one and we suggest that it be read in connection with this case, as it fully sustains the position of the state as to the constitutionality of a similar rating act and upholds a similar reduction. *Aetna Insurance Company, et al.*, v. *Travis*, 257 Pac. 337; *Aetna Insurance Company, et al.*, v. *Travis*, 259 Pac. 1068.

Relator asks a reconsideration of the case of *German Alliance Insurance Company* v. *Lewis*, 233 U. S. 389. Inasmuch as this opinion has been followed by practically every state in the American Union and has been reaffirmed by this court, we deem it inadvisable to present an argument in its support. To now say that fire insurance is not affected with a public interest is to proceed backwards. These companies proceeded through the Missouri Supreme Court on the theory that the Missouri Rating Act was constitutional and, having lost their lawsuit on facts, now take the position that such Act is unconstitutional. This they can not do.

Conclusion.

For seven years appellant and all of these other fire insurance companies doing business in Missouri

have resisted a 10 per cent reduction in fire insurance rates, effective November 15th, 1922. The Missouri Supreme Court found against them and upheld the reduction order. The Supreme Court of the United States refused to disturb such finding. A three-judge court denied them a temporary injunction to again litigate this question. The discretion of such court in refusing such injunction will not be set aside by this court in the absence of a strong showing that such injunction should have been granted. The court was justified in refusing this injunction on many grounds other than those stated by the court, and we respectfully insist that this litigation should end and that the judgment of the lower court should be affirmed.

Respectfully submitted,

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Attorney General of Missouri,
G. C. WEATHERBY,
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FLOYD E. JACOBS,
JOHN T. BARKER,
Counsel for Appellees.

OPINION

SUPREME COURT OF THE UNITED STATES.

No. 104.—October Term, 1929.

National Fire Insurance Company of Hartford, Appellant, *vs.* Joseph B. Thompson, Superintendent of the Insurance Department of the State of Missouri, et al.	Appeal from the District Court of the United States for the Western District of Missouri.

[April 14, 1930.]

Mr. Justice Butler delivered the opinion of the Court.

This is one of 155 suits brought by stock insurance companies to have § 6283, Revised Statutes of Missouri, 1919, adjudged invalid and to restrain the enforcement of an order of the state superintendent of insurance promulgated October 9, 1922, on the ground that the section and order are repugnant to the due process and equal protection clauses of the Fourteenth Amendment. In each case there was an application to a court of three judges for an interlocutory injunction. 28 U. S. C., § 380. It was denied, without prejudice to renewal upon condition specified, in 114 cases of which this is one, and it was granted in 41 cases. 34 F. (2d) 185. This is an appeal from the denial of plaintiff's application. 28 U. S. C., § 345(3).

Section 6283 provides:

> "The superintendent of insurance . . . is hereby empowered to investigate the necessity for a reduction of rates, and if, upon such investigation, it appears that the result of the earnings in this state of the stock fire insurance companies for five years next preceding such investigation shows there has been an aggregate profit therein in excess of what is reasonable, he shall order such reduction of rates as shall be necessary to limit the aggregate collections . . . to not more than a reasonable profit. Any reduction ordered . . . shall be applied, subject to his approval: *Provided*, that the superintendent of insurance shall designate the class or classes

to which the reduction shall be applied if the companies do not, within thirty days from the order of reduction, submit a class or classes which meet his approval. . . ."

Section 6284 provides that the orders of the superintendent shall be reviewable by the courts, that upon such review the entire matter shall be determined *de novo*, and that while it is pending insurers shall not charge any rate in excess of that fixed by the superintendent.

January 5, 1922, the superintendent had directed that rates on all fire, lightning, hail and windstorm insurance be reduced 15 per cent. The plaintiff and other stock insurance companies doing business in Missouri brought a joint suit in the circuit court of Cole county to enjoin the enforcement of that order. Temporary restraint was granted. The attorneys for the respective parties entered into a stipulation reciting that the superintendent had revoked the rate order and agreeing that there be entered of record in the case an order in substance as follows:

> The case is dismissed and the restraining order dissolved.
>
> The superintendent may call a hearing to investigate the necessity for a rate reduction; the companies will produce evidence required by him or that they may see fit to present; at the conclusion of the hearing he will make findings of fact and announce his determination thereon, and he shall also make certain specified findings.
>
> If based on such findings and determination, an order be made reducing rates, it will apply alike to all classes of risks and, if dissatisfied, the companies will proceed to secure a review of the order in the circuit court of Cole county.
>
> No injunction to restrain the reduction shall be applied for; but, pending such review and until final determination of the case, the rates in force prior to the making of the order will be collected by the companies and they will "give bond, conditioned and in such amount as the court may direct, to refund to the assured any excess of premiums collected by them if such order . . . be finally sustained by decree or judgment of a court of last resort."
>
> The question of the constitutionality of §§ 6283 and 6284 will not be raised nor will the legality of the hearing provided for be questioned.

October 9, 1922, the superintendent made the order that is the subject of this suit. It directed that, effective November 15, rates be reduced 10 per cent. November 10, plaintiff and other companies

brought the matter before the court named in the stipulation for review. Upon the requirement of the court they executed a bond for the use of those to whom insurance policies might be issued by them prior to final decree. That court held the rates confiscatory and set aside the order. Its judgment was reversed in the state supreme court. 315 Mo. 113. The case was brought here and, January 3, 1928, was dismissed on the ground that no federal question was presented. *Aetna Insurance Co.* v. *Hyde,* 275 U. S. 440.

February 1, 1928, the superintendent designated the classes of risks to which the reduction should be applied, and thereupon this suit was commenced. The district court found the stipulation valid and that under it plaintiff, and other companies in whose behalf it was made, had collected rates in excess of those prescribed and had failed to refund. On that ground the court denied plaintiff's application, but without prejudice to renewal after repayment.

Plaintiff contends that the stipulation made in the earlier case by the attorneys for all the companies cannot operate against it in this case. The stipulation shows that when it was made another rate reduction was contemplated. All its provisions, except the one dismissing the review then pending, relate to procedure to be followed in making the reduction and for review. In lieu of the rule that during the pendency of the review insurers should not charge any rate in excess of those fixed by the superintendent (§ 6284), it was arranged that the rates existing prior to the order should continue to be charged until final determination of the case. The companies were to give a bond to be fixed by the court to secure refund should the reduction finally be sustained. It is clear that the stipulation was intended to apply to the subsequent order and to any review of it.

But plaintiff insists that the stipulation contains no promise to refund. The pertinent language is quoted above. The stipulation and order constituted the only basis of the companies' right to continue to collect the higher premiums. When read having regard to the circumstances and context, the quoted language reasonably may be construed to be a promise by each company to return to its policy holders the excess charges paid by them pending final determination of the validity of the reduction.

Plaintiff claims that the superintendent failed to make the specified findings and so relieved it from any obligation under the stipulation. An affidavit filed in support of its motion for tempo-

rary injunction states that the superintendent did not make these findings. The order is not in the record. The plaintiff failed to present the findings that were made. There is no showing that the companies produced the information called for by the superintendent or that he was not lawfully excused from making such findings. We may notice the record of that case in this court.* 275 U. S. 440. The order is there fully set forth. It states that the companies refused to furnish the superintendent the necessary facts and that accordingly such findings could not be made. Clearly plaintiff's showing is not sufficient to require the court to find that the superintendent was not excused by the companies' refusal to furnish information as agreed.

Plaintiff contends that the collection of the higher rates was not made pursuant to the stipulation. It does not appear whether, in addition to prescribing the bond, the court authorized the collection of higher premiums until final determination of the validity of the reduction. The stipulation was sufficient to support such an order, and there is nothing in the record to require a finding that one was not made. See *State ex rel. Hyde* v. *Westhues*, 316 Mo. 457, 466. In view of the requirement of § 6284 that pending review insurers shall not charge more than the reduced rates and in the absence of any other disclosed authority to continue to exact the higher premiums, it is right to attribute the excess charges to the promise to refund.

Plaintiff lays much emphasis upon the fact that it will suffer irreparable loss if compelled to apply the lower rates during the litigation and the order is finally held unlawful, whereas, if the temporary injunction be granted, policy holders may be protected by an appropriate provision in the decree. *Ohio Oil Co.* v. *Conway*, 279 U. S. 813, 815. But, in respect of plaintiff's right to have a temporary injunction, its position is not as good as it would have been if this suit had been brought when the rate order was passed. As

*Butler *v.* Eaton, 141 U. S. 240, 243. Aspen Mining & Smelting Co. *v.* Billings, 150 U. S. 31, 38. Washington & Idaho R'd. *v.* Coeur D'Alene Ry., 160 U. S. 101. Craemer *v.* Washington, 168 U. S. 124, 129. Bienville Water Supply Co. *v.* Mobile, 186 U. S. 212, 217. Dimmick *v.* Tompkins, 194 U. S. 540, 548. Fritzlen *v.* Boatmen's Bank, 212 U. S. 364, 370. de Bearn *v.* Safe Deposit Co., 233 U. S. 24, 32. Freshman *v.* Atkins, 269 U. S. 121, 124. United States *v.* California Canneries, 279 U. S. 553, 555. Cf. Pickford *v.* Talbott, 225 U. S. 651, 654.

against the joint attack the reduction has been sustained by the court of last resort. Plaintiff has not repaid the policy holders. It now assails the statute as well as the order and seeks again to prevent the taking effect of the prescribed rates. The retention of the higher premiums that it obtained by means of the stipulation and the denial of its promise to refund are facts properly to be considered. Courts of equity frequently decline to interfere on behalf of a complainant whose attitude is unconscientious in respect of the matter concerning which it seeks relief. *Deweese* v. *Reinhard,* 165 U. S. 386, 390. While the rule which plaintiff invokes is one of general application, it cannot be said that the lower court erred in withholding relief until plaintiff makes good its promise to refund.

Plaintiff contends that, as the companies failed to submit, and the superintendent until February 1, 1928, did not designate the classes to which the reduction should be applied (§ 6283), the lower rates did not take effect until that time. But by the stipulation the parties agreed that such order should apply to all classes alike. That was a sufficient designation in advance. And the promise to refund, the bringing of the suit to review the reduction and the giving of the bond all support the view that, as to the companies making the stipulation, the rate reduction was then consummated. The court's imposition of the condition that excess premiums collected from November 15, 1922 be repaid is not without adequate support.

A decree of the district court denying an interlocutory injunction will not be reversed unless shown to be contrary to some rule of equity or the result of an improvident exercise of judicial discretion. *Meccano, Ltd.,* v. *John Wanamaker,* 253 U. S. 136, 141. *Chicago Great Western Ry.* v. *Kendall,* 266 U. S. 94, 100. Applying that rule we find no adequate ground for reversal.

Decree affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.